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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GERALD T. FREY
Superintendent, Missouri Eastern Correctional Facility,
Petitioner,

v.

VICTOR PAUL ANDERSON
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit utilized the wrong standard of review in concluding that respondent was not accorded due process due to the manner used to the method used to select bystander jurors in New Madrid County, Missouri.

2. Whether the Eighth Circuit's conclusion that §494.250.2, RSMo is, *de facto,* unconstitutional is correct in that this conclusion has no precedential support.

3. What safeguards does the United States Constitution require when trial courts discover that talesmen or bystander are required to complete the venire?

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, denying respondent's petition for a writ of habeas corpus, is unreported and appears as Appendix B of the present petition. The Magistrate's report and recommendations upon which the District Court's order was founded are attached as Appendix C of this petition. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the District Court and granting respondent's petition for a writ of habeas corpus is appended hereto as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, granting respondent's petition for a writ of habeas corpus under 28 U.S.C. §2254, was filed on August 31, 1983. Pursuant to 28 U.S.C. Section 2101(c), the present petition for a writ of certiorari was required to be filed within ninety (90) days of the entry of this judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution, in pertinent part, provides as follows:

> "All persons born or naturalized to the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 494.250.2, RSMo 1978, reads as follows:

> "In all cases where the Board of Jury Commissioners fails to select jurors and alternates, as required by law, the sheriff of the county shall summon petit jurors from the several townships in the county, according to their respective populations, and as nearly as may be, not less than ten days before the first day of the term of court for which the jurors are summoned; and the sheriff when ordered by the court demanding a jury shall summon petit jurors during the term from the by-

standers, after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record."

STATEMENT OF FACTS

Respondent Anderson was charged by information on August 18, 1980, with attempted robbery in the first degree in New Madrid County on or about May 26, 1980. Appellant was tried by a jury in the Circuit Court of New Madrid County on October 29, 1980, and on that same date, the jury returned a verdict of guilty of attempted burglary in the first degree. Appellant was sentenced to ten years imprisonment. The evidence adduced at trial was as follows.

On May 26, 1980, respondent, Henry Holloman and Tom Moore met in Howardville, Missouri, and agreed to rob Mattie's Package Store in nearby Catron (Tr. 36, 48, 51). Three men got into Mr. Moore's automobile, and he drove them to the store in Catron (Tr. 36, 48). There, respondent and Mr. Holloman got out of the car and went into the store (Tr. 36, 49).

Once inside, Mr. Holloman asked the proprietor, Mattie Thompson, for one-half pint of Canadian Mist whiskey (Tr. 28, 36). Ms. Thompson asked them for some type of identification (Tr. 28). At this time, respondent pulled a ski cap down over his head and drew a gun (Tr. 28, 36). Ms. Thompson began to scream, and respondent and Mr. Holloman turned around and ran out the door (Tr. 28, 36-37). They both got back into the car, and Mr. Moore drove them away (Tr. 29, 37, 49). Ms. Thompson was unable to identify either man who came into her store, but both were about the same size and age as respondent (Tr. 29-30).

All three men were eventually arrested and confined in the New Madrid County Jail (Tr. 49, 62-63). While confined in jail, appellant gave a letter to his friend, Linda Owens, with instructions that she deliver it to Mr. Holloman (Tr. 57). That letter stated as follows:

"Say Blood.

"I would just like for you to know that you didn't have to put the (X) in my back. But so you did. I just wish you would have gotten some money for it. Because it was not worth what you got. And that was lie to you. See they said that you wouldn't be too far behind me. And that Tom was going to be the only one that didn't get any time.

"And I'll see you when you get there. don't [sic] worry I'll look out for you when you do get there.

"I don't hate you. I just don't understand. You can run but you can't'— There's a mark with an 'H/ So enjoy yourself because you will be here and there soon.

"Victor Paul Anderson
"the man you (+)
"hope to see you
"when ever" (Tr. 60).

Ms. Owens did deliver that letter and returned to appellant a letter from Mr. Holloman (Tr. 58), which stated as follows:

"Hellow Blood

"Sitting here with your letter in had [sic]. I am going to do my best to let you know what went down. It [sic] like this. Tom did it. Our lawyer said that the man wanted you and said that I had a chance to keep myself out by putting it on you because Tom was already going to do that. Tom [sic] mother made some

kind of deal with Ivy to get him out. He did not have a bondsman. Ivy got him out. I feel that had a good chance to win. But when our lawyer call [sic] us out and said that Tom statement and what Tom was going to say I was finish [sic]. I don't blame you for thinking the way you do. But I felt I can do you more good out here. Man[,] I made you a promise about your child and I am going to do my best. On your letter it seem that you forgot that I am a man to [sic]. Man[,] everyday Robert came to the job to see if I am there and by the house every night. Tom was and Memphis friday [sic] when robert [sic] came out to the job and all he said was that it ok and look at me [sic]. You mae [sic] be right about me [sic] not being far behind you. But its to beat to cahnce now [sic]. So I have to go through with it. Getting up on that stand and saying that shit was the hard [sic] thing I doin' in my life in I have to do it again [sic]. I hope this letter has help [sic] you to understand what is going on. And I am not trying to put the cross on Tom that is how things went [sic].

"P.S. If you need something[,] tell
Linda to tell me
and you got it.
And I am not trying to buy something. We already
got friendship"
(Tr. 60-61)

At trial, twenty-six veniremen had been summoned from the list drawn up by the Board of Jury Commissioners (Tr. 21). Of those, four were absent and four were struck for cause. Thus, of the twenty-eight veniremen left on the panel before challenges, eighteen had been summoned by the Board of Jury Commissioners. The ten remaining ve-

niremen were summoned by the sheriff under two special venires. Respondent challenged, for cause, all the members of the jury panel who had been summoned by the sheriff (Tr. 19-20). This challenge was denied (Tr. 20). Respondent then moved to quash the jury panel on the ground that an insufficient number of veniremen had been summoned by the Board of Jury Commissioners (Tr. 20-21). This Motion to Quash was denied (Tr. 25).

Respondent then filed a notice of appeal to the Supreme Court of Missouri on September 11, 1980. On appeal, respondent's sole contention was that the state trial court had erred in failing to quash the jury panel because respondent had thereby been deprived of his right to a petit jury selected from a fair cross-section of his community. On September 8, 1981, the Supreme Court of Missouri affirmed respondent's conviction, *State* v. *Anderson*, 620 S.W.2d 378 (Mo. 1981).

Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri, on September 24, 1981. Respondent raised the jury-selection issue, along with several other issues. Petitioner's response was that he had failed to exhaust state remedies on the other grounds and that the sole exhausted ground provided no basis for relief.

On December 8, 1981, United States Magistrate David D. Noce recommended that respondent be given an evidentiary hearing on the jury-selection issue and that respondent's remaining grounds be dismissed for failure to exhaust state remedies. The district court accepted the magistrate's Report and Recommendation, and an evidentiary hearing was held on April 21, 1982. At the conclusion of this hearing, both parties were given leave to file briefs. On August 9, 1982, Magistrate Noce filed his Report and Recommendation, by which he recommended that Re-

spondent's Petition for Writ of Habeas Corpus be denied (Exhibit C). The district court entered its order adopting the Report and Recommendation of the magistrate and denied the petition for habeas corpus on September 3, 1982 (Exhibit B).

The district court issued a certificate of probable cause for appeal, and respondent appealed the district court decision to the United States Court of Appeals for the Eighth Circuit. That court reversed the decision of the district court in *Anderson* v. *Frey*, No. 82-2208-EM, decided August 31, 1983 (Appendix A). To avoid duplication, the details of the Eighth Circuit's holding will be discussed in the argument, *infra*.

Jurisdiction of the United States District Court

The basis for the district court's jurisdiction in this cause was 28 U.S.C. Section 2254.

ARGUMENT

I. BACKGROUND

It is well known that when a venire is not complete, the trial judge may direct that the venire be completed by the summoning if "talesmen" or "bystanders." This is a practice that existed at common law. *State* v. *McCambry*, 225 Kan. 803, 594 P.2d 222 (1979); *Bruce* v. *State*, 169 Miss. 335, 152 So. 490 (1934).

The early practice was to direct the sheriff to summon the additional jurors, *id*, and this duty was codified early in the history of this country. *See Clawson* v. *United States*, 114 U.S. 477, 5 S.Ct. 949, 29 L.Ed. 179 (1885), citing §804 of the Revised Statutes; §15, RSMo 1845. Indeed, the practice of ordering the sheriff to summon talesmen was the practice in the federal system until 1968. Title 28 U.S.C. §1866(a) (repealed) read:

> "Whenever sufficient petit jurors are not available, the court may require the United States Marshal to summon a sufficient number of talesmen from the bystanders."

Petitioner has found no cases holding that this statute was either constitutional or unconstitutional, but generally, the selection of talesmen under the federal statute and its predecessors was upheld, *St. Clair* v. *United States*, 154 U.S. 134, 14 S.Ct. 1002, 38 L.Ed. 936 (1894); *Lovejoy* v. *United States*, 128 U.S. 171, 9 S.Ct. 57, 32 L.Ed 389 (1888); *United States* v. *Meyer*, 113 F.2d 387 (7th Cir. 1940); *Cravens* v. *United States*, 62 F.2d 261 (8th Cir. 1932), as were occasional challenges to similar state statutes, *Humes* v. *Robbins*, 128 F. Supp. 586 (D.Me. 1955). However, in cases where the United States Marshal did not follow the statute, the case would be reversed. *Ippolito* v. *United States*, 108

F.2d 668 (6th Cir. 1940) (United States Marshal called his relatives to fill the venire).

State statutes regarding the summoning of talesmen were substantially similar to the former federal practice and were also generally upheld against challenge, either for failure to comply with the statute, *Losieau* v. *State*, 157 Neb. 115, 58 N.W.2d 824 (1953); *People* v. *Siciliano*, 4 Ill. 2d 581, 123 N.E.2d 725 (1955); *Taylor* v. *State*, 420 S.W.2d 601 (Tex. 1967); *State* v. *Olek*, 179 N.W.2d 320 (Minn. 1970), or on due process grounds, *State* v. *McCambry*, *supra*; *State* v. *Cody*, 323 N.W.2d 863 (S.D. 1982).

Respondent would note that while although there is some movement away from the traditional method of summoning talesmen (see 18 U.S.C. §1866), the traditional method is still in place in several jurisdictions, Cal. Code C.P. §227, Ill. Rev. Stat. §78-12, Kan. Stat. §43-167, N.J. Rev. Stat. 2A: 74-10, and Ohio Rev. Code Ann. 2313.38.

II. PRIOR CASES IN THIS AREA

In *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980), *cert. denied*, 450 U.S. 958, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1981), the Court of Appeals held that when a sheriff whose department investigated the crime also selected only his acquaintances as the talesmen, there was a rebuttable resumption of prejudice. The court noted a series of state cases and one federal case that required a showing of prejudice, 634 F.2d at 1083-1084, but chose to ignore those cases and, instead, relied upon the authority of *Peters* v. *Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), in order to create this presumption. The Court of Appeals did not mention that the opinion quoted from did not command a majority of this court[1] In sum, *Henson* established an ir-

[1]The Court of Appeals mentioned other cases that have used "the probability of prejudice" to vacate convictions. These will be discussed *infra*.

rebuttable presumption of prejudice that does not require any affirmative evidence of prejudice by a defendant or that would allow evidence of no prejudice to be produced by the state.

In *Holt* v. *Wyrick*, 649 F.2d 543 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1002 (1982), the prisoner failed in his challenge because he had established neither of the factors set out in *Henson*. The Court of Appeals considered these two factors to be "equally important." 649 F.2d at 546. The next case considering this issue was *Thompson* v. *White*, 661 F.2d 103 (8th Cir. 1981), *vacated and remanded*, 456 U.S. 951, 102 S.Ct. 2003 (1982), *on remand*, 680 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 830 (1983). *Thompson* was reversed based on the authority of *Henson*. The reasons given were that the sheriff might be biased in selecting the jurors and that the sheriff had selected the entire panel, 661 F.2d at 107.

In the instant case, the sheriff was the supervisor of the deputy sheriff who investigated the crime. The bystander jurors were obtained by five deputies and one city marshal. The investigating deputy was not one of these five and was not called as a witness by the state at trial, although he was called by the defendant. The Court of Appeals vacated the conviction, although the case was "a close one on the facts" (Appendix A).

The Court of Appeals held that the central concern in *Henson* is the unfairness that arises when an interested official selects the bystander jurors. The court also strengthened a presumption first suggested in *Henson*, which is that a law enforcement official, while selecting these bystander jurors, will not act properly, but will tend to select pro-conviction veniremen. In fact, despite the express holding in *Holt* that there is no fundamental unfairness when a law enforcement official who was uninvolved in the investi-

gation selects the talesmen, the court held that the uninvolved city marshal was sufficiently interested. Indeed, the result of this unwarranted extension of *Henson* is that the Missouri statute regarding the selection of bystander jurors is *de facto* unconstitutional.

ANALYSIS

A.

Respondent submits that the irrebuttable presumption of error standard adopted by the Eighth Circuit is flawed, along with that court's irrebuttable resumption of prejudice. The Court of Appeals has erred in adopting these standards of review because there is no authority for these tests in the decisions of this Court, and they stand in contravention to analogous cases, such as *Casteneda* v. *Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Duren* v. *Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); and *United States* v. *Kelton*, 518 F.2d 531 (8th Cir. 1975), *cert. denied*, 423 U.S. 1021, 96 S.Ct. 460, 46 L.Ed.2d 394 (1976). The preceding cases have yielded a test under which the state may respond with positive evidence should the challenging party make a *prima facie* case and require a showing of affirmative prejudice. The Court of Appeals has also failed to consider the practical safeguards available to a defendant concerned about jury prejudice under Missouri law, including unrestricted voir dire of potential jurors and free change of venue in countries where the population is under 75,000. The end result is that the Eighth Circuit has declared §494.250.2, RSMo 1978, to be *de facto* unconstitutional.

Respondent will first argue that the Court of Appeals erred in establishing an irrebuttable presumption of constitutional error, a standard first enunciated in *Henson* v. *Wyrick*, *supra*, and applied in the instant case. Respondent believes that the Eighth Circuit has, in developing the

Henson standard, ignored cases analogous to this case and similar cases. The Court of Appeals has also dispensed with, by omission, the presumption that a public official will perform his duties in compliance with the law.

This Court has, in past years, considered several cases where either grand or petit juries were challenged under theories where groups were being omitted from service. In none of those cases did the court utilize a irrebuttable presumption of constitutional error; rather, if the party challenging the system could make a *prima facie* case regarding the exclusion of a group, then the state would be afforded an opportunity to offer positive evidence that the omissions were justified or occurred as the result of a nonbiased selection process. *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Casteneda* v. *Partida, supra; Duren* v. *Missouri, supra.*

The Eighth Circuit standard in *Henson* and in the case at bar held that if the challenging party could make a *prima facie* case, constitutional error was presumed, with the effect that the State of Missouri could not, despite *Swain* and *Taylor*, etc., offer evidence that the method used to select bystanders was justifiable. Thus, petitioner submits that the Court of Appeals has erred in the basic determination of whether constitutional error exists in a given case.

Even more egregious is the Court of Appeals' presumption of prejudice. In *Henson*, the Court held:

> "When the potential prejudice is as great as it was here a showing of actual prejudice to the defendant is not necessary in order to warrant a new trial." 634 F.2d at 1085.

The court cited it in a footnote to *Peters* v. *Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), as support for this

holding. The opinion and footnote do not mention that the material quoted from *Peters* commanded only three members of this Court. Also briefly discussed was *Taylor* v. *Louisiana*, 419 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), where the Court vacated a conviction based on the possibility that the bailiff witness had impermissible contact with jurors. *Taylor is* easily distinguished from both *Henson* and the case at bar, as will be demonstrated below.

The chief distinguishing factor between this case and *Taylor* is the array of procedural protections that a party is accorded under Missouri law to ensure an impartial jury. First, a party who suspects prejudice has a full and virtually unfettered opportunity to voir dire the potential jurors. Voir dire in Missouri is still conducted by the attorneys, and the defendant has the opportunity to ferret out any biases that may exist. See 29 Mo. Law Review 259, 305 (1964); 34 J.Mo.Bar. 111 (1978). In fact, the questions that would be asked by a defendant in this situation are the same questions that would normally be asked on voir dire: Does the venireman know the sheriff or any of the witnesses? Is the venireman disposed to convict? Can the venireman consider the evidence, forgetting any prior notions or opinions? The entire purpose behind voir dire is to expose any bias or prejudice in order to guarantee the right to a fair trial by impartial jurors, and if a juror can lay aside his prejudices or opinions and render a verdict based on only the evidence, the Constitution is satisfied. *Dobbert* v. *Flordia*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), *rehearing denied*, 434 U.S. 882, 98 S.Ct. 246, 54 L.Ed.2d 166 (1977).

The opinion of the Court of Appeals in *Henson* stated that the voir dire procedure would not be effective in discovering prejudice in these cases. 634 F.2d at 1085. Not only is this statement unsupported, but should be rejected as an attack upon the entire system in which we select juries in

the United States. Petitioner would remind this Court that respondent received a full opportunity to voir dire this jury panel; respondent has not identified any juror who, arguably, should have been removed for cause due to bias. Respondent's opportunity to identify and locate bias or prejudice was greater than he would have been afforded in the federal courts, and petitioner argues rejection of the Court of Appeals' premise that voir dire is ineffective to discover prejudice in potential jurors.

Further, a defendant has other safeguards should he become concerned about the possibility of prejudice. Missouri law allows a defendant an automatic change of venue, on request, from any county with a population of 75,000 or fewer inhabitants, Rule 32.03, or on a showing of prejudice, Rule 32.04. A change of judge is also automatic, Rule 32.06. In sum, there is a panoply of means by which a defendant can avoid or identify prejudice in a jury panel. These means were unavailable to prevent the prejudice in *Taylor*, and therefore these cases are distinguishable. Had the Eighth Circuit been able to isolate any instance of prejudice from the record, petitioner would have no ground for this petition; however, being unable to identify any actual prejudice in the record, the Court of Appeals was forced, again, to adopt the irrebuttable presumption of prejudice as enunciated in *Henson*.

In creating this irrebuttable presumption in *Henson* and in continuing to apply it in this case,[2] the Court of Appeals has demonstrated the existence of a double standard. In *United States* v. *Kelton*, *supra*, the Eighth Circuit reiterated their rejection of the "per se theory of implied bias," in favor of a requirement that actual prejudice be

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[2]The lack of basis for the Eighth Circuit's presumption is made clear by the court's own admission that neither the sheriff nor his deputies engaged in any illegal conduct.

demonstrated. 518 F.2d at 533. *Kelton* was a challenge to a conviction under 28 U.S.C. §2255, the post-conviction relief statute for federal convictions. Yet, when considering a challenge to a state conviction under 28 U.S.C. §2254, the Eighth Circuit has adopted a theory of implied prejudice (the irrebuttable presumption of prejudice) that it declines to use in reviewing federal convictions. It goes without saying that such a double standard is in direct opposition to the principle of state and federal comity. Petitioner is aware of no case or statute that permits a federal court to employ one standard in review of a federal conviction, while exercising a more stringent standard in review of a state conviction. In all the errors of omission and commission made by the Eighth Circuit in dealing with the Missouri talesmen cases, the establishment of this double standard is most striking.

The establishment of the irrebuttable presumption of prejudice by the court also ignores a fundamental principle of judicial analysis—that a public official will perform his duties in accordance with the law, and the burden to prove otherwise by irrefragable proof is on the complainant. *Starr* v. *Federal Aviation Administration,* 589 F.2d 307 (7th Cir. 1978); *Parsons* v. *United States,* 670 F.2d 164 (Ct.Cl. 1982). There has been no suggestion in the case at bar that the sheriff or his deputies did anything but perform their duties in accordance with the law, both statutory and constitutional. Indeed, the Court of Appeals concedes as much. The failure by the Court of Appeals to consider this presumption, in what respondent believes is a necessary determination of prejudice in the selection of talesmen, is yet another error in the Eighth Circuit's analysis of the Missouri talesmen cases.

The result of this line of cases, extending from *Henson,* to the instant case is to declare the Missouri statute to be, *de facto,* unconstitutional. Is doing so, the Court of

Appeals has avoided a fundamental principle of constitutional law--that a state statute is presumptively constitutional. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harvard Law Review 129 (1893); *Flemming* v. *Nestar*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), *rehearing denied*, 364 U.S. 854, 81 S.Ct. 29, 5 L.Ed.2d 77 (1961). *Williams* v. *General Foods Corporation*, 492 F.2d 399 (7th Cir. 1974). The Court of Appeals should have openly stated that they believe the Missouri statute unconstitutional (and, by extension, the statutes of the several states with similar provisions) or specified in what instances the statute might be constitutionally applied. Although this is not in itself sufficient reason to grant certiorari, this does point out the flawed manner in which the Eighth Circuit has con-sidered this line of cases.

Although this statute is capable of misuse, as was the former federal statute, see *Ippolito* v. *United States, supra*, the Eighth Circuit's blanket presumption of prejudice has rendered the Missouri statute virtually unusable. For reasons mentioned below, even repeal of §494.250, RSMo 1978, and replacement by the state with the presumably valid federal scheme, 28 U.S.C. §1866, would not prevent great harm to Missouri jurisprudence or to the interests of a majority of the states. This *de facto* declaration of unconstitutionality is unnecessary and could be avoided if the challenging party had to come forth with evidence that there was actual prejudice caused by the allegedly unconstitutional practice. Then, only those persons truly wronged by the method of selection would be given relief, while those persons unable to isolate or identify any prejudice would not receive relief that is unwarranted and undeserved. The double standard created by the Eighth Circuit is not only hostile to the notion of state-federal comity but has led to the ultimate conclusion that the Missouri method for se-

lection of talesmen—the system of several other states and the former system utilized by both the federal system and numerous state courts—is, *de facto,* unconstitutional.

B.

The final item to be addressed is the effect of the Missouri talesmen cases on petitioner and other jurisdictions. If the irrebuttable presumption relied upon by the Court of Appeals (which would include that court's double standard of review) is allowed to stand, then an untold number of convictions believed valid until recent date will be challenged not only in Missouri, but, conceivably, in any jurisdiction that is incarcerating persons convicted by a jury containing talesmen selected under the common-law method, including the federal system. As the prisoner would not have to demonstrate any prejudice to receive relief, the vast majority of prisoners would be entitled to federal habeas corpus relief, and due to the passage of time, many of these persons could not be retried.

Secondly, petitioner argues that should Missouri adopt the method of selection of talesmen advocated by the Eighth Circuit and codified in federal statute, that adoption would serve to make little difference in practical terms. Each of the Missouri talesmen cases have come from rural counties. Obviously, summoning jurors is much more difficult in a rural county than in an urban area, because there is a smaller pool of potential veniremen. It is likely that many of the supposedly "pro-conviction" jurors who know or are known by the local sheriff will be called, regardless of the method of selection (assuming that the state had been selecting "pro-conviction" jurors). Although the federal system may theoretically reduce the possibility of constitutional abuse, the State of Missouri ought to be allowed to use a system derived at common law, utilized for scores of years in this nation, and accepted until recently as an approved method of supplementing venires.

CONCLUSION

In view of the foregoing, the petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Victor Paul Anderson,
Appellant,

v.

Gerard Frey, Superintendent of Missouri Eastern Correctional Center,
Appellee.

No. 82-2208

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: February 17, 1983

Filed: August 31, 1983

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

McMILLIAN, Circuit Judge.

Victor Paul Anderson appeals from a final judgment entered in the District Court for the Eastern District of Missouri denying his petition for writ of habeas corpus. For reversal appellant argues the district court erred in finding that the method of selecting supplemental prospective jurors or "bystander" jurors used in his trial did not violate due process. For the reasons discussed below, we reverse the judgment of the district court and remand with directions.

Procedural History

Appellant was found guilty by a jury of attempted armed robbery in the Circuit Court for New Madrid County, Missouri, in October 1980. Appellant was sentenced to ten years imprisonment. Appellant appealed his conviction to the Missouri Supreme Court alleging that the county sheriff unconstitutionally participated in the selection of the jury panel pursuant to Mo. Rev. Stat. §494.250(2) (1978).[1] The Missouri Supreme Court rejected this constitutional attack and affirmed his conviction. *State* v. *Anderson*, 620 S.W.2d 378 (Mo. 1981).

In September 1981 appellant filed this petition for writ of habeas corpus raising four grounds for relief: (1) the state improperly called a witness who was not listed as a prosecution witness, (2) the jury was unconstitutionally selected, (3) appellant was unlawfully arrested and did not receive a full and fair hearing, and (4) two state witnesses committed perjury at the trial. The district court referred the petition to a magistrate pursuant to 28 U.S.C. §636(b). The magistrate found that appellant had failed to exhaust available state remedies with respect to every ground except the jury selection ground[2] and recommended an evi-

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[1]Pursuant to Mo. Rev. Stat. § 494.250(1) (1978), the Clerk of the Board of Jury Commissioners prepares a list of prospective jurors by selecting names at random from voter registration lists. If, after the list of prospective jurors is exhausted by absences or excuses for cause, the number of remaining prospective jurors is less than 24, the sheriff on order of the court "shall summon petit jurors during the term from the bystanders." *Id.* §494.250(2); *see State* v. *Alexander*, 620 S.W.2d 380, 384 (Mo. 1981) (banc).

[2]Appellant may raise the other grounds for relief in state post-conviction relief proceedings. Appellant exhausted available state remedies with respect to the jury selection ground by raising that issue before the Missouri Supreme Court. All that we require is that a state be given one full and fair opportunity to decide a question. *E.g.*, *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975).

dentiary hearing on that ground in light of *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980) (filed Nov. 12, 1980), *cert. denied*, 450 U.S. 958 (1981), a case decided after the trial in the present case in which this court disapproved of the same method of bystander juror selection. *Anderson* v. *Frey*, No. 81-1187-C(2) (E.D. Mo. Dec. 8, 1981).

Following the Supreme Court's disapproval of mixed petitions for writ of habeas corpus in *Rose* v. *Lundy*, 455 U.S. 509 (1982), appellant elected to waive his three unexhausted grounds and to proceed on the jury selection ground only. Following an evidentiary hearing, the magistrate found that the method used to select bystander jurors in the present case did not violate due process and distinguished the present case from *Henson* on three grounds: the sheriff did not personally select any of the bystander jurors but delegated that responsibility to deputy sheriffs and city marshals, the sheriff placed some limitations on the exercise of discretion by the deputy sheriffs and no sheriff's department personnel testified on behalf of the prosecution. *Anderson* v. *Frey*, No. 81-1187-C(2) (E.D. Mo. Aug. 9, 1982). The district court accepted the report and recommendation of the magistrate and denied the petition for writ of habeas corpus. This appeal followed.

Background Facts

Appellant's trial was held in October 1980 in New Madrid County, Missouri. New Madrid County is a rural and relatively sparsely populated county in southeast Missouri. In 1980 the county sheriff's department consisted of a sheriff, four full-time deputies and several city marshals who served as part-time deputies. The sheriff is an elected official. The sheriff's department's duties include law enforcement, criminal investigation, subpoenaing prospective jurors and witnesses, and delivering civil summonses. The sheriff also serves as the bailiff during criminal trials and is in charge of or supervises the selection of bystander

jurors upon order of the county circuit court pursuant to Mo. Rev. Stat. §494.250(2). At the evidentiary hearing the sheriff testified that in 1980 in order to select bystander jurors he would contact the deputy sheriffs and city marshals by radio and direct them to select a certain number of persons for jury service. The sheriff would give the deputy sheriffs and city marshals general guidelines (i.e., sex and race) in order to produce a mixed panel of bystander jurors representative of the county. The deputy sheriffs and city marshals testified that they selected bystander jurors within these general guidelines. They tried to select "upstanding citizens" who were county residents and "available" for jury service on the basis of their personal knowledge of the particular individual. The sheriff testified that he would veto a particular bystander juror if the individual was a close friend or for some other good reason unqualified.

Of the twenty-six prospective jurors summoned by the Clerk of the New Madrid County Board of Jury Commissioners for appellant's trial, four were absent and four were removed for cause. The state trial court directed the sheriff to summon a total of thirteen bystander jurors to complete the jury panel. The sheriff contacted five deputy sheriffs and one city marshal, who was not an employee of the sheriff's department, and asked them to find the necessary bystander jurors. The selections were made on short notice; the supplemental venire orders were issued on October 27 and 28 and the trial was scheduled to begin October 29. The sheriff was slightly acquainted with all thirteen bystander jurors but did not know any of them well. On the first day of trial one of the bystander jurors was removed for cause and two were absent. Appellant challenged the ten bystander jurors for cause and then moved to quash the jury panel on the grounds that the jury commissioners had improperly failed to summon a sufficient number of

prospective jurors and the necessary bystander jurors had been selected by the sheriff. The state trial court denied both motions. Three of the bystander jurors served on appellant's jury.

The New Madrid County sheriff's department conducted the investigation of the attempted armed robbery for which appellant was convicted. The sheriff testified that he did not personally conduct the investigation but that he was the supervisor of the deputy sheriff who was primarily responsible for the investigation. The investigating deputy sheriff was not involved in the selection of the bystander jurors. The sheriff served as the bailiff during appellant's trial but did not testify at the trial. The investigating deputy sheriff was called as a witness by the defense[3] and testified about his investigation and about written and oral statements made by one of the persons involved in the attempted armed robbery which tended to incriminate appellant.

Discussion

The issue in the present case is whether the sheriff's involvement in the selection of bystander jurors deprived appellant of due process.

This court has been concerned with the opportunity for abuse presented when the sheriff or another "key man" exercises discretion in selecting bystander jurors to complete jury panels. *See Ross* v. *Wyrick*, 581 F.2d 172, 174-75 (8th Cir. 1978) (unconstitutional underrepresentation of blacks on master jury list was not cured by sheriff's personal selection of blacks as bystander jurors); *cf. Cravens* v. *United States*, 62 F.2d 261, 271 (8th Cir.) (selection of

[3]Appellant represented himself at his trial. He did so against the advice of his defense attorney. The defense attorney conducted the voir dire proceedings and assisted appellant throughout the rest of the trial.

bystander jurors by "interested" marshal under repealed federal statute), *cert. denied,* 289 U.S. 733 (1933). This court has reviewed the sheriff's selection of prospective jurors in three recent cases, *Henson* v. *Wyrick,* 634 F.2d 1080, *Holt* v. *Wyrick,* 649 F.2d 543 (8th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982), and *Thompson* v. *White,* 661 F.2d 103 (8th Cir. 1981), *vacated and remanded,* 456 U.S. 941, *on remand,* 680 F.2d 1173 (1982) (per curiam), *cert. denied,* 103 S. Ct. 830 (1983).

In *Henson* v. *Wyrick* the record showed that the sheriff hand-picked his acquaintances to serve as bystander jurors.[4] 634 F.2d at 1081-82. The sheriff was not personally involved in the investigation of the crime at issue in the case, but the sheriff's subordinates were responsible for the investigation and the arrest of the defendant and testified at trial. *Id.* The court held that the sheriff's selection of his acquaintances as the bystander jurors in order to complete the jury panel violated the defendant's due process rights. *Id.* at 1084. The court stated that although neither the fact that some jurors were acquaintances of the sheriff nor the fact that the state court allowed the sheriff some discretion in the selection of bystander jurors would in itself invalidate the conviction, *id.*, there was a considerable, and unacceptable, risk that the sheriff would select

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[4]The sheriff in *Henson* v. *Wyrick,* 634 F.2d 1080, 1081 (8th Cir. 1980), *cert. denied,* 450 U.S. 958 (1982), testified that

> to select bystander jurors he would go through the phone book or a list prepared by his office and, knowing the people in the county, select "regular citizens [and] high standard people to be jurors." The sheriff admitted that he would sometimes select jurors without relying on the phone book by calling people he thought would be available. Other times the sheriff would select standby jurors from local banks or businesses. The sheriff generally knew all the people he called. He made a conscious effort to select "solid citizens" and persons whom jury service would not inconvenience, e.g., retired persons or, in the winter, farmers.

bystander jurors sympathetic to the prosecution. *Id.* at 1085. In addition there was the possibility that the jurors would associate the credibility of the sheriff with that of the deputy sheriff who was a prosecution witness. *Id.* The court recognized that defense counsel has the opportunity to show bias on voir dire and thus protect the defendant from the potentially prejudicial bystander jurors selected by the sheriff but rejected voir dire as an adequate remedy. *Id.* "The subtleties involved in identifying [prospective] jurors' sympathies and predicting their evaluation of deputies' prospective testimony are often too intangible to identify during voir dire." *Id.* Moreover, the availability of voir dire does not really address the defendant's complaint that the method used to select bystander jurors was itself fundamentally unfair. *Cf. Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942) (dangers in selection of prospective jurors). The court concluded that under the circumstances a showing of actual bias was not necessary and granted the defendant a new trial. 634 F.2d at 1085 & n.5, *citing Peters* v. *Kiff,* 407 U.S. 493, 502-04 (1972).[5]

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[5]Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

. . . .

It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Peters v. *Kiff,* 407 U.S. 493, 502-04 (1972) (citations and footnote omitted) (standing question).

The facts were slightly different in *Holt* v. *Wyrick*. In *Holt* the defendant's trial had been removed to the neighboring county on a change of venue. For that reason, the sheriff who selected the bystander jurors for the defendant's jury panel was not associated with the sheriff's office that conducted the investigation of the crime with which the defendant was charged. 649 F.2d at 546. The court held that " '[s]ince the sheriff and his deputies were not involved in [the investigation of] this case prior to trial, there was no question of the sheriff acting out of loyalty to deputies or on the basis of special knowledge of the facts of the case.' " *Id.*, *citing State* v. *Holt*, 592 S.W.2d 759, 768 (Mo. 1980). "Equally important" to the court was the fact that the defendant presented no evidence that the sheriff had selected only his acquaintances to serve as bystander jurors. 649 F.2d at 546.

In *Thompson* v. *White* the sheriff personally selected the entire jury panel pursuant to an order of the state trial court,[6] not just the bystander jurors. Although the sheriff did not investigate the crime, the sheriff knew that the defandant was charged with fatally shooting a local law enforcement officer. The court concluded that under these circumstances "[t]he sympathy that the sheriff would feel for a fellow officer and his family would provide 'great potential for the sheriff to hand-pick jurors sympathetic to the prosecution.' " 661 F.2d at 107, *citing Henson* v. *Wyrick*, 634 F.2d at 1084. The court concluded that the case was much closer to *Henson* than to *Holt* and vacated the defendant's conviction.

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[6]The defendant was first tried in state court in 1961, but that conviction was reversed and the case remanded for a new trial following post-conviction relief motions. The defendant was again tried and convicted in 1966. The defendant challenged the jury selection in his 1966 trial in his petition for writ of habeas corpus in federal district court.

The present case is a close one on the facts. The sheriff was not personally involved in either the criminal investigation or, unlike *Henson*, the actual selection of the bystander jurors. However, unlike *Holt*, the criminal investigation and the actual selection of the bystander jurors were handled by the same sheriff's employees under his supervision. Under these circumstances we think the present case is much closer to *Henson*.

The central concern in the *Henson* case was the fundamental unfairness of an interested official's selecting the bystander jurors. 634 F.2d at 1082, *citing Cravens* v. *United States*, 62 F.2d at 271. The *Henson* court characterized the sheriff as an interested official because of the sheriff's institutional role and professional involvement in law enforcement, not because of any personal motives. 634 F.2d at 1084; *see State* v. *Alexander*, 620 S.W.2d at 386 (Bardgett, J., concurring) ("The sheriff is the chief law enforcement official in the county and in my opinion can never be regarded as totally unbiased regarding a criminal prosecution, regardless of what agency did the investigation. Sheriffs want prosecutions to be successful . . . ."). Where the underlying crime involves a law enforcement officer, as in *Thompson*, the sheriff's institutional interest in the prosecution and conviction of the defendant is exacerbated. Where the investigation did not involve a fellow law enforcement officer and was conducted by a different law enforcement agency, as in *Holt*, the sheriff's institutional interest is arguably attenuated. 649 F.2d at 546.

We are not persuaded that the sheriff has significantly reduced his institutional interest by delegating the actual selection of the bystander jurors to his subordinates. The sheriff is their immediate superior and can veto any of their selections. Moreover, the deputies are employees of the sheriff's department and thus share the sheriff's institu-

tional and professional interest in successful prosecutions. One of the city marshals was not an employee of the sheriff's department but has a similar institutional interest in law enforcement. The fact that the sheriff may have limited the exercise of discretion by the selecting officials by specifying neutral and objective selection criteria, such as residency and availability, does not address the constitutional defect at issue: the selection of bystander jurors by an interested official or his or her subordinates or professional associates. It is the participation of an interested official in the juror selection process that is fundamentally unfair. As noted in *Henson*, neither the exercise of some discretion nor the fact that some bystander jurors, or even all the bystander jurors, are acquainted with the sheriff will invalidate the conviction. 634 F.2d at 1084. We are concerned with the integrity and fairness of the method[7] used to select the bystander jurors.

We are aware that the pressure of time and the small population in rural areas may make the selection of bystander jurors by the sheriff the more expedient method. However, we believe that fundamental fairness requires a different method of bystander juror selection. The *Henson* court suggested random selection from a master jury list or the appointment of a special bailiff. *Id.* at 1085. There was some indication during oral argument that the problem of the selection of bystander jurors has been circumvented by the summoning of more prospective jurors, thus reducing the likelihood that bystander jurors would be required in any particular case.

Accordingly, the judgment of the district court is re-

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[7]Our holding that the *method* of bystander juror selection used in the present case is fundamentally unfair does not represent any negative evaluation of the sheriff's conduct or that of his deputies in selecting the bystander jurors.

versed. The district court is directed to grant the writ of habeas corpus and vacate the conviction. The state authorities should be directed to release appellant unless appellant is granted a new trial within a reasonable period of time as determined by the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON, *Petitioner,* v. GERARD FREY, Superintendent, Missouri Eastern Correctional Center, *Respondent.*	No. 81-1187 C (2)

ORDER

Upon consideration of the record, the Magistrate's report and recommendation, and petitioner's objections thereto,

IT IS HEREBY ORDERED that the report and recommendation of the Honorable David D. Noce, United States Magistrate, be and is accepted.

IT IS FURTHER ORDERED that petitioner's petition for a writ of habeas corpus be and is denied and that this case be and is dismissed.

John P. Nagle
UNITED STATES DISTRICT JUDGE

Dated: September 3, 1982

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON, *Petitioner,* v. GERALD FREY, Superintendent, Missouri Eastern Correctional Center, *Respondent.*	No. 81-1187 C(2)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Victor Paul Anderson for a writ of habeas corpus under 28 U.S.C. §2254 was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

Petitioner Anderson's original petition presented four separate grounds for habeas relief. The undersigned, in the original report and recommendation in this action, determined that petitioner had exhausted available state court remedies as required by §2254(b) and (c) on only one ground: The jury was unconstitutionally selected and empaneled by New Madrid County Sheriff Walter Ivy who was an "interested" party. Subsequently, petitioner chose to delete the three unexhausted grounds and proceed on the one exhausted ground as required by the recent Supreme Court decision, *Rose* v. *Lundy*, ____ U.S. ____, 102 S.Ct.

1198 (1982). An evidentiary hearing was held in this action on April 21, 1982 in Cape Girardeau, Missouri. Petitioner was not present, but was represented by counsel. Petitioner's counsel presented testimony from Ivy, James Pickard, Deputy Sheriff of New Madrid County, and Louis Alfred Scott, City Marshal of Risco, Missouri.

FINDINGS OF FACT

1. Walter Ivy has been Sheriff of New Madrid County, Missouri, since 1976. (Tr. 4). New Madrid County has 14,000 registered voters and Ivy would recognize 65-70% of those persons. (*Id.*, 26). Ivy has been a resident of the county since 1940, and has been involved in county law enforcement since 1960. (*Id.*, 30-31).

2. The Sheriff's department employs four full-time deputies, and also employs some city marshals throughout the county as part-time deputies. (*Id.*, 4.) The Sheriff's duties include subpoenaing jurors and witnesses acting as bailiff during criminal trials, and delivering civil summons. (*Id.*, 4.)

3. Ivy also has the special duty of procuring jurors for special panels for criminal trials. (*Id.*, 5.) This process of securing such jurors begins when he receives a special venire facias order from the circuit court to empanel a certain number of jurors. (*Id.*) The Sheriff's normal policy as of October 1980 was to utilize an informal selection process designed to produce a mixed panel, one containing blacks and women as well as persons residing throughout the entire county. The other selection criteria are that the jurors must be: (a) county residents (*id.*, 8); (b) available, for jury duty (*id.*, 31); (c) not prejudiced (*id.*, 15); and (d) "upstanding" citizens (*id.* 25). The two most significant criteria were residency and availability. (*Id.*, 31.) The Sheriff would contact certain of the deputies or city mar-

shals by radio and direct each to select a certain number of persons (sometimes directing the person to select a number of blacks or women) leaving it to the deputy sheriff or city marshal to select the specific persons. The deputies determine whether a potential juror is a county resident based upon their personal knowledge of the individual. (*Id.*, 8.) Sheriff Ivy gives his deputies no specific instructions as to the method of selection but once they have obtained people who satisfy the above criteria, they are to call Sheriff Ivy and provide him with the names. (*Id.*, 13.) The Sheriff might veto a particular juror selected by his deputies, if he believed the individual is a close personal friend of his, or was unqualified for some other good reason. (*Id.*, 32-33.) The deputies would not tell prospective jurors the name of the defendant in the particular case, but normally they would be aware themselves who the defendant was. (*Id.*, 9.)

4. The New Madrid County Sheriff's Department arrested petitioner and investigated the attempted robbery charge for which he was eventually convicted. The investigation was conducted by Deputy Sheriff Ronnie Patterson and Sheriff Ivy was not involved, except as Patterson's supervisor. (*Id.*, 22-23.) Sheriff Ivy served as bailiff at petitioner's trial, which involved opening and closing court and overseeing the jurors. (*Id.*, 21-22.) Ivy was initially listed as a witness for the state, but did not testify. Deputy Patterson testified at trial on behalf of petitioner. (Resp. Exh. A, 65-71.)

5. At petitioner's trial held in October 1980, twenty-six veniremen were summoned from a list drawn up by the New Madrid County Board of Jury Commissioners (Resp.Exh. A, 21). Of those, four were absent and four were stricken for cause. (Resp.Exh. E.) Consequently, the Circuit Court prepared two special venires and delivered them to Sheriff Ivy on October 27 and 28, 1980. (Resp.Exh. F and G.) These venires directed Sheriff Ivy to summon a

total of thirteen additional persons to complete the jury panel. These venires did not show the style of the case, only the case number, but Sheriff Ivy knew who the defendant was. (*Id.*, 10-11.)

6. To execute the venires Ivy contacted five of his deputies to secure jurors. He also contacted Louis Scott, who is not one of his deputies, but who serves as City Marshal of Risco, Missouri, in New Madrid County. (*Id.*, 31.) Ed Martin, a part-time deputy and the Marshal of Lilbourn, Missouri, secured three jurors: Howard Tillman, a white male from Conran, Missouri, Owen Riley, a white male from Lilbourn, Missouri, and Sam Riley, a black male from Lilbourn. (*Id.*, 20-21; 26-29.) Joe Moore, a part-time deputy and the Marshal of Portageville, Missouri, also secured three jurors: George Young, a black male, Ed Moody, a white male, and Abbie Coffee, a black female. (*Id.*, 19-20; 27-29.) All three of these individuals were from Portageville. Part-time Deputy Bud Ross, who is also the Marshal of Morehouse, Missouri, secured two individuals, Bonita J. Schuchart and Johnny Ward. (*Id.*, 28.) Robert Young, a full-time deputy and a resident of Howardville, selected one individual, M.B. Young, a black male from Howardville. (*Id.*, 28.) James Pickard, a full-time deputy residing in Gideon selected two individuals: Donna Nettles and Cleo Patillo, both of Gideon. (*Id.*, 16-17.) Louis Alfred Scott, the city marshal in Risco, Missouri, who is not an employee of the Sheriff's department, selected two individuals: Raymond Mays, and Virgil Penrod, both of Risco. (*Id.*, 50-53.) Sheriff Ivy did not veto any of these selections. (*Id.*, 34.) Thus, of the thirteen persons selected for the jury pool by the Sheriff's deputies three were females. The record shows the race of only seven of the thirteen individuals; four of these individuals were black.

7. Sheriff Ivy had a very casual acquaintance with eight of the special jurors. He was only slightly better ac-

quainted with the other five: Tillman, Nettles, Mays, Moody, and Penrod. (*Id.*, 33.) He was not closely acquainted with any of the special jurors. (*Id.*)

8. James Pickard has been a deputy sheriff in New Madrid County since 1977 (*id.*, 37). He works out of the courthouse in Gideon, Missouri, a town of approximately 1,200 people. (*Id.*, 38.) When Pickard is asked to select special jurors, he normally selects persons whom he knows will not be too inconvenienced by serving on a jury, and who are county residents. (*Id.*, 39.) He normally informs his selections by telephoning them and asking them if they can serve on the jury. (*Id.*) Pickard was contacted by Sheriff Ivy and directed to obtain two jurors for petitioner's jury pool. He contacted Donna Nettles and Cleo Patillo by telephone and they agreed to serve as jurors. (*Id.*, 42-43.) Pickard is acquainted with almost everybody in the town of Gideon. (*Id.*, 44.)

9. Louis Alfred Scott is the City Marshal in Risco, Missouri, which is located seventeen miles from New Madrid. (*Id.*, 45.) He has served in that capacity for approximately fifteen years, and is not an employee of the Sheriff's department. When asked to pick bystander jurors he would normally pick individuals he knew to be "pretty good citizens." (*Id.*, 47.) Scott was asked to select two individuals for petitioner's trial. He located Virgil Penrod at a service station, and asked him to serve as a juror (*Id.*, 50-51). He drove to Raymond Mays' house in Risco and asked him to be a juror. (*Id.*, 52.) Scott never knew whether particular people would be available to serve as jurors until he asked them. (*Id.*, 48.)

10. Of the thirteen individuals summoned by the Sheriff's deputies, one was excused for cause, M. B. Young, and two were absent on the day of trial, George Young and Sam Riley. (Resp.Exh. E.) Consequently, of the twenty-

eight veniremen who appeared for trial, eighteen had been summoned by the Board of Jury Commissioners and ten had been summoned by the Sheriff pursuant to the venire facias orders. (Resp.Exh. A, 21-22; Resp.Exh. E.) Petitioner challenged for cause the ten special jurors who had been summoned pursuant to the special venires on the ground that these jurors "were not selected by the jury commissioners but were selected by the Sheriff." (Resp. Exh. A, 19-20.) This challenge was denied by the trial court. (*Id.*, 20.) Petitioner then moved to quash the jury panel on the ground that an insufficient number of veniremen had been summoned by the Board of Jury Commissioners. (*Id.*, 20-21.) This motion was also denied. Three of the ten persons summoned by the Sheriff eventually served on petitioner's jury: Nettles, Patillo, and Penrod. (*Id.*, 25-26; Resp.Exh. E.)

CONCLUSIONS OF LAW

The case which is determinative of petitioner's unconstitutional jury selection is *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980), *cert. denied*, 450 U.S. 958 (1981). Henson's conviction was reversed because of a defective selection process for bystander jurors under §494.250(2) RSMo. 1969.[1] The Butler County, Missouri, sheriff who

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[1]That statute provides, in pertinent part:

> In all cases where the Board of Jury Commissioners fails to select jurors and alternatives as required by law the Sheriff of the County shall summon petit jurors from the several townships in the County, according to their respective populations, is nearly as may be, not less than ten days before the first month of the term of the court for which the jurors are summoned; and the Sheriff when ordered by the Court demanding a jury shall summon petit jurors during the term from the bystanders after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record.

selected the jurors for Henson's trial admitted that he handpicked all the bystander jurors from among his acquaintances:

> In an evidentiary proceeding before the magistrate, the Sheriff testified that to select bystander jurors he would go through the phone book or a list prepared by his office and, knowing the people in the county, select "regular citizens [and] high standard people to be jurors. The Sheriff admitted that he would sometimes select jurors without relying on the phone book by calling people he thought would be available. Other times the Sheriff would select bystander jurors from local banks or businesses. The Sheriff generally knew all the people he called. He made a conscience effort to select "solid citizens" and persons whom jury service would not inconvenience, e.g., retired persons or, in the winter, farmers. The Sheriff's office deputy who aided in the selection of bystander jurors, stated: "We would serve no one that we didn't think would be reliable, dependable person to be a good juror."
>
> The Sheriff testified that he was not personally involved in the investigation of the crime for which Henson was convicted. The deputy sheriff who was primarily responsible for the investigation of the defendant's crime testified that he was not involved in selecting jurors or bystander jurors, serving subpoenaes on jurors, or compiling a list of bystander jurors. The Sheriff selected fourteen of his acquaintances to complete the venire panel for Henson's trial. Seven of the twelve petit jurors came from the Sheriff's handpicked list.

Id., at 1081. The Court concluded that the constitutional defect in Henson's jury was that the Sheriff had handpicked his acquaintances to complete the venire panel. *Id.,*

1084. It was further noted that although a trial court could allow some discretion in the selection of jurors, the Sheriff could not exercise his discretion to insure that only his acquaintances would fill venire panel vacancies. *Id.* In reaching its final conclusion the Court in *Henson* quoted the United States Supreme Court's description of the potential dangers of a discretionary juror selection process such as that allowed by §494.250(2):

> and, its [the duty of selecting jurors] exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors *may exercise some discretion* to the end that competent jurors may be called. *But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.* (Emphasis added.)

Id., at 1043, quoting *Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942). Most recently the Supreme Court has affirmed that its primary concern is that jury selection processes will produce jury pools which reflect a fair cross-section of the community. *See Duren* v. *Missouri,* 439 U.S. 357, 358-59 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975).

The instant case is distinguishable from Henson, and the process employed to select petitioner Thompson's venire jury panel was not constitutionally offensive.

First, Sheriff Ivy actually played a very passive role in the selection process. Rather than doing any of the selection himself he delegated it *entirely* to his deputies and to one city marshal. It is clear that the Sheriff's deputies handpicked the bystander jurors from among their ac-

quaintances, but this was done as an expeditious method to facilitate the two primary criteria for bystander jurors: (1) residency, and (2) availability.[2] As the testimony at the evidentiary hearing indicated, because of the small size of New Madrid County, even a totally random selection process would have likely resulted in a jury panel comprised almost entirely of acquaintances of the Sheriff and his various deputies.

Another factor distinguishing this case from *Henson* is that Sheriff Ivy placed some limitations on the discretion of his subordinates in selecting bystander jurors. Sheriff Ivy's selection procedure was calculated to obtain citizens constituting a geographical, racial, and gender-based cross-section of New Madrid County. He gave specific instructions to various deputies to select only persons of a particular race or sex. In fact, of the thirteen bystanders chosen by the Sheriff's department, four were black and three were female. Moreover, the selection process was delegated among six individuals covering different portions of the county to insure a geographical cross-section of New Madrid County residents.

Finally, unlike the circumstances in *Henson*, no one from the Sheriff's department testified for the prosecution at petitioner Anderson's trial. In fact, Ronnie Patterson, the deputy who investigated the crime, testified for the defense. (Resp.Exh. A, 65-71.) Consequently, the potential for the jury to associate the credibility of the Sheriff's De-

---

[2]As noted at the evidentiary hearing, the methods employed to select the special jurors varied from deputy to deputy. Deputy Pickard indicated that he specifically sought persons who he was acquainted with, persons he knew to be county residents and whom "it [jury duty] wouldn't inconvenience too much." Risco City Marshal Louis Scott, on the other hand, indicated he employed a much more random procedure. (Tr. 48-51.)

partment with a prosecution witness was not a factor in the instant case.

It is the conclusion of the undersigned that the selection process employed in this case was not tainted by the same flaws found in *Henson*. Although Sheriff Ivy clearly employed some discretion in selecting jurors to complete the panel, he did not utilize his discretion to insure that all the bystander jurors were selected from among his own acquaintances. Furthermore, the process utilized was calculated to obtain a group representative of the community and constituting a fair cross-section of that community. Under these circumstances, it cannot be said that petitioner's Sixth and Fourteenth Amendment rights have been violated. Consequently, petitioner's claim of unconstitutional jury selection is without merit.

RECOMMENDATION

For the reasons set out above, it is the recommendation of the undersigned United States Magistrate that the petition of Victor Paul Anderson for a federal writ of habeas corpus be dismissed. The parties are advised that they have ten days within which to file written objections to this Report and Recommendation.

Respectfully submitted,

David D. Noce
UNITED STATES MAGISTRATE

Dated this 9th day of August, 1982.

SUPREME COURT, U.S.
FILED
DEC 14 1983
ALEXANDER L. STEVAS
CLERK

No. 83-725

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GERALD T. FREY

Petitioner,

v.

VICTOR PAUL ANDERSON

Respondent.

On Petition From The United States Court
Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jason M. Rugo
Gallop, Johnson & Neuman
1800 Pierre Laclede Center
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St. Louis, Missouri 63105
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Attorney for Respondent.

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III. FORMA PAUPERIS STATEMENT

Pursuant to Supreme Court Rule 46, respondent moves for leave to proceed in forma pauperis and in support thereof states that counsel of record for respondent was appointed by the District Court below pursuant to the Criminal Justice Act of 1964, as amended, and leave was granted by the District Court to proceed in forma pauperis. A copy of the District Court Order appointing counsel and granting leave to proceed in forma pauperis is reproduced in the Appendix at A-1.

IV. STATEMENT OF THE CASE

Respondent, Victor Paul Anderson, was tried before a jury on October 21, 1980, in New Madrid County, Missouri, for attempted robbery, first degree, convicted and sentenced to ten years in prison. A list drawn from the registered voting records by the New Madrid County Board of Jury Commissioners summoned twenty-six veniremen for trial. Four of these veniremen were absent at the trial and another four were stricken for cause, learning only eighteen of the original twenty-six. Knowing that insufficient jurors would be available at trial on October 29, 1980, the Circuit Clerk's Office prepared, on October 27 and 28, 1980, two special venires directing sheriff Walter Ivy to summon thirteen additional tales to complete the panel. This method of procuring additional tales was standard practice in New Madrid County at the time of respondent's trial although this method is not used now. Transcript of Hearing, held April 21, 1982, Cape Girardeau, Missouri, at 8, reproduced at Appendix B and (hereinafter cited as "A.B. at ___.").

Sheriff Ivy testified that it was left to his discretion as to how to select jurors and he consequently delegated his deputies and one city marshal to locate the tales. A.B. at 7-9. New Madrid County consists of many small townships including Gideon (population 1,508) and Risco (population 500). A.B. at 9. The U.S. Magistrate for the District Court found as a matter of fact that Sheriff Ivy's deputies selected only their own acquaintances to complete the venire panel. State Petition at A-20, 21. Of these persons chosen, Sheriff Ivy knew each one on a social basis. A.B. 15-21, 29.

These persons (three of which served on the Anderson jury) observed Sheriff Ivy as bailiff at trial and the Sheriff had custody of an handled the jury during trial. A.B. 21, 22. The sheriff's acquaintances on the jury acknowledged him in the courtroom at trial. A.B. at 22. Finally, three of Sheriff Ivy's deputies testified at trial. Tr. at 62, 65 and 71.

V. SUMMARY OF ARGUMENT

The State has utterly failed to demonstrate that any of the criterion of Supreme Court Rule 17 governing the granting of certiorari apply in the case at bar.

Contrary to the State's assertions, the Eighth Circuit in overturning respondent's conviction did not employ an irrebuttable presumption of prejudice and did not declare the Missouri jury selection statute per se unconstitutional. Rather, the overturning of respondent's conviction is simply the latest of four cases from the Eighth Circuit in which the activities of interested law enforcement personnel in rural Missouri counties have been closely scrutinized where such interested officials exercise their discretion to ensure that only their acquaintances are chosen to complete a jury venire panel in a criminal trial. Such a practice no longer occurs in New Madrid County where respondent was tried and convicted and, accordingly, the issues presented by the State in its Petition for a Writ of Certiorari are moot and without consequence.

ARGUMENT

Contrary to the assertions of the State of Missouri in its Petition for Writ of Certiorari, the line of cases to which the State objects to, the principal case being Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1980), cert. denied, 450 U.S. 958, 67 L.Ed.2d 383, 101 S. Ct. 1417 (1981), does not render Section 494.250.2, R.S.Mo. 1978 unuseable or unconstitutional. Rather, the line of cases deals forcefully with abuse and potential for abuse in an interested law enforcement official picking only his own acquaintances to complete a jury venire panel in a criminal proceeding. These cases are clearly limited to their factual settings and establish no new legal principles other than to reinforce the longstanding judicial concern with interested officials handpicking a bystander panel particularly in a rural county. Henson, supra, at 1082.

The leading case in the line of cases to which the State objects is Henson, supra. In that case, a prisoner convicted in a rural Missouri county contended that an interested official, the county sheriff, exercised his discretion to handpick his acquaintances as tales. Id. at 1081. The Court held that where the sheriff had supervised the criminal investigation and exercised his discretion under Section 494.250.2 R.S.Mo. (1978) to handpick only his acquaintances as tales, then a violation of due process had occurred and a new trial was required.

The Court in Henson did not require the petitioner to demonstrate actual prejudice, i.e., that a particular juror was prejudiced, but found such a method of jury selection to be so fundamentally unfair that the practice was to be condemned as creating a "probability of unfairness" and one of the "circumstances that create the likelihood or the appearance of bias." Peters v. Kiff, 407 U.S. 493, 502-3 (1972) (quoted with approval in Henson, supra, at 1085, fn. 5).

The next case in this series was Holt v. Wyrick, 649 F.2d 543 (8th Cir. 1981). Again, this case involved a sheriff in a rural county selecting bystander jurors. The Court found

no evidence that this sheriff exercised his discretion to select only his acquaintances. Id. at 546. Equally important, the Court noted that the trial was held in a nearby county and the sheriff's department in the trial venue was completely uninvolved in the investigation of the subject crime. Although the Court still expressed concern over this method of selecting bystander jurors, there was no basis for inferring any prejudice and, hence, a denial of due process. Id.

The next case, Thompson v. White, 661 F.2d 103 (8th Cir. 1981), also involved a rural county sheriff handpicking jurors. While the sheriff was not involved in the investigation of the crime, the alleged crime involved the fatal shooting of a police officer. This factor was coupled with the fact that this particular sheriff handpicked the entire jury panel. The Court expressed fears that a "conviction-prone" jury had been impanelled and that the prejudice existing in the case required a new trial for the defendant. Id. at 107.

As is clearly evident, each of the above three cases turned completely on their factual contexts. The Court in each case did not create an irrebuttable presumption of prejudice. In each case the State was given ample opportunity to demonstrate the fairness of the methods used. In Holt, supra, the State succeeded. In Henson, Thompson, and the case at bar, the State was unable to make such a demonstration.

Moreover, the well-reasoned decisions from the Eighth Circuit comported fully with the fundamental criminal process of providing an impartial jury to decide an alleged criminal's guilt or innocence.

The State attempts to make much of the fact that in this Court's decision of Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S. Ct. 2163 (1972) only three justices joined in the majority opinion. State Petition at 9, 13. The State fails to observe that the concurring opinions of Justices White, Brennan and Powell did not in any way take issue with the essential principles in the Court's opinion. In Peters, the Court observed that:

> Long before this Court held that the Constitution imposes the requirement of jury trial on the states, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based upon the evidence and law.

Peters, supra, 407 U.S. at 501.33 L.Ed.2d at 93. The Court continued:

> Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it.

Peters, supra, 407 U.S. at 502, 33 L.Ed.2d at 93.

This Court concluded that a state cannot compel a defendant to trial by a jury selected in an arbitrary and discriminatory manner which would "cast doubt on the integrity of the whole judicial process" and create the appearance of bias as well as "increase the risk of actual bias. . . ." Peters, supra, 407 U.S. at 502.503, 33 L.Ed.2d at 93. The Court properly noted that:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty."

Peters, supra, 407 U.S. at 504, 33 L.Ed.2d at 94.

The State asserts without discussion or citation to language that the Eighth Circuit has created an irrebuttable presumption of prejudice in the Henson line of cases. State Petition at 9, 10. In fact, nothing could be farther from the truth. Had such been the case, the decision in Holt, supra, would have been entirely different. When the State can show that no fundamental unfairness has occurred, as in Holt, then the prior conviction has been upheld.

The State also lists many cases dealing with the purposeful exclusion of particular groups from a jury panel, such as blacks and women, and claims that Henson and its offspring violate the principle that the State can rebut a

prima facie case of discrimination with evidence of rationale or fairness in the selection system. State Petition at 11. The State assertion that these discrimination cases are analogous to Henson or the case at bar misconstrues the holdings of the cited cases. The cases cited do hold that a state can rebut a prima facie case of discrimination (not prejudice). Nothing in the cited cases requires a defendant who has shown prima facie discrimination to then go on and show actual prejudice. In fact, in Castaneda v. Partida, 420 U.S. 482, 51 L.Ed.2d 498, 97 S. Ct. 1272 (1977) and Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S. Ct. 664 (1979) the only issue was the prima facie showing of purposeful discrimination. Neither case requires a defendant who has shown discrimination to also show prejudice. The explanation for this is clear, for if discrimination is demonstrated, the jury is presumptively prejudicial and "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Turner v. Louisiana, 379 U.S. 466, 472, 13 L.Ed.2d 429, 424, 85 S. Ct. 546 (citing and quoting with approval Irwin v. Dowd, 366 U.S. 717, 722, 6 L.Ed.2d 751, 755, 81 S.Ct. 1639).

Indeed, the concern with "subjective screening" of potential jurors, H.R.Rep. No. 1076, 90th Cong., 2d. Sess, reprinted in [1968] U.S. Code Cong. Ad. News, pp. 1792, 1794, 1797, led Congress to change the federal jury selection statute from one of marshals selecting bystanders from court, Title 28 U.S.C. §417 (1934), to one of random selection from specified lists in a manner ordered by the Court. Title 28 U.S.C. §1866(f).

The Eight Circuit has not held that Section 494.250.2 R.S.Mo. is per se unconstitutional and the State has not pointed to any language in the case at bar or in Henson and its offspring so holding. Rather, each decision was based entirely on its factual context as was the case at bar.

The United States Magistrate concluded in his Report and Recommendation that "it is clear that the sheriff's deputies handpicked the bystander jurors from among their

acquaintances. . . ." State Petition at A-20, 21. Such a practice was rationalized as "expeditious" under the circumstances but the Eighth Circuit rightly rejected such a rationalization. In the case at bar the deputies who either participated in or were members of the department that investigated the alleged crime exercised their discretion to ensure that only their acquaintances were chosen as tales. Of these persons eventually chosen to serve on the jury, the sheriff knew everyone on a social basis. The sheriff further served as bailiff at trial and had custody of the jury.

In Turner v. Louisiana, 379 U.S. 466, 13 L.Ed. 2d 424, 85 S. Ct. 546 (1965) this Court reversed a conviction, without a showing of prejudice, where two deputies who testified had custody of the jury during and after tial. The Court stated that:

> Mr. Justice Holmes stated no more than a truism, when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.'

Turner, supra, at 379 U.S. at 4712, 13 L.Ed.2d at 429. The Court held that relationship between the jury and deputies "could not but foster the juror's confidence in those who were their official guardians during the entire period of the trial." Turner, supra, 379 U.S. at 474, 13 L.Ed.2d at 429-30.

In the case at bar, not only did the deputies pick their own acquaintances, and the sheriff serve as bailiff with custody of the jury, but three deputies testified and while they were called by defendant (defending himself pro se) their testimony was damaging to his case. It is inconceivable that given such pervasive circumstances the jury would not associate the credibility of the sheriff's department with the prosecution. Essentially, jurors picked by the sheriff's deputies, their acquaintances, served on a jury in the custody of the sheriff as bailiff, and heard testimony damaging to plaintiff from three of his deputies. The law enforcement personnel of New Madrid County pervaded this entire trial from jury selection to conviction.

To defend this fundamentally unfair practice the State points to certain protective measures available to a defendant including voir dire and a free change of judge. State Petition at 13, 14. It is difficult to see how a free change of judge could in any way cure a constitutionally defective jury selection process. And voir dire is an inherently subjective process that could not possibly protect a defendant from a trial process dominated by the very persons who had brought the charges, investigated the crime and had a strong interest in securing a conviction.

In fact the one method by which this entire appeal could have been avoided is ignored by the State although not by the Eighth Circuit. State Petition at A-10. The Court noted that "there was some indication during oral argument that the problem of the selection of bystander jurors has been circumvented by the summoning of more prospective jurors, thus reducing the likelihood that bystander jurors would be required in any particular case." It is as simple as that. The State pleas that its statute has been declared unconstitutional or that it has no way to go about selecting jurors in light of Henson all fall away through the simple procedure of calling enough prospective jurors in the first place.

The State of Missouri does not labor under nearly so great a burden as they would have this Court believe. The overturning of this respondent's conviction is merely the latest of four cases in which the Eighth Circuit has considered the possible abuse of discretion of an interested law enforcement officer handpicking his acquaintances as bystander jurors. Each case is clearly evaluated exclusively on its own facts and does not in any way render the State jury selection statute unconstitutional. Rather, the cases serve clear notice that a sheriff must not abuse his discretion when he is an interested official by selecting his acquaintances to complete a jury panel. That the events of all the cases discussed took place in small rural counties certainly played a part in the Court's determinations. In fact, the excesses that led to this line of cases have been cured as the Eighth Circuit noted

when it reversed this respondent's conviction. The appeal by the State is therefore moot and utterly fails to establish any reason under Supreme Court Rule 17 for this Court to hear this case further.

CONCLUSION

For the reasons stated above, respondent respectfully requests the Court deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

GALLOP, JOHNSON & NEUMAN

By _____

Jason M. Rugo
1800 Pierre Laclede Center
7733 Forsyth Boulevard
St. Louis, Missouri 63105
(314) 862-1200
Attorneys for Respondent
Victor Paul Anderson

RULE 28 CERTIFICATE OF MAILING

Jason M. Rugo, appointed attorney for respondent Victor Paul Anderson, makes oath and swears that the foregoing Brief in Opposition to Petitioner's Petition for a Writ of Certiorari was mailed and deposited in a United States Post Office in Clayton, Missouri, first class, postage prepaid, on December 12, 1983, within the permitted time, addressed to the Clerk of the Court, United States Supreme Court with copies sent to the Attorney General for the State of Missouri in Jefferson City, attorneys for Petitioner.

Jason M. Rugo

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

Subscribed and sworn to before me this 12th day of December, 1983.

Notary Public

My Commission Expires:

DATE	NR	PROCEEDINGS
9/24/81		PETITION fld. In forma pauperis granted by CSC. Submitted to Judge Nangle for consideration.
9/30/81		ORDER (JFN) fld., IT IS HEREBY ORDERED that respondents shall SHOW CAUSE, in writing, within 30 days of this date, why the relief requested should not be gran cc: attys. by cert.-mail.
11/2/81		RESPONSE to Order to Show Cause fld. by respondent w/attached exhibits A-H.
		11/6/81 - Response to Order to show cause and entire file re-submitted to Judge Nangle.
11/10/81		ORDER (JFN) fld., It is hereby ordered that this cause be and is referred to Magistrate: Noce for his review/recommendation. cc: attys.
12/8/81		REPORT/RECOMMENDATION (DDN) fld. Parties have 10 days to file objections.
12/21/81		OBJECTIONS to report and recommendation fld. by respondent.
		12/22/81 - Report and recommendation of Magistrate Noce and entire file submitted to Judge Nangle.
12/29/81		ORDER (JFN) fld., It is hereby ordered that the Report and Recommendation of Magistrate Noce be and is accepted. It is further ordered that upon the motion of the respondents, Mr. Frey will be listed as respondent in all future proceedings in this cause, and this case shall be dismissed as to respondents Carl White and John Ashcroft. It is further ordered that this case be and is referred to Magistr Noce to conduct any necessary evidentiary hearing and to appoint counsel. cc: atty
12/30/81		CJA 20 appointing Jason M. Rugo as atty. for pltff.
12/30/81		ORDER (DDN) fld., It is hereby ordered that the Clerk provide atty. Jason Moore Rugo with a photocopy of all papers previously filed in this action. cc: attys. copy of file forwarded to pltff's appointed atty.
/5/82		ORDER (DDN) fld., It is hereby ordered that within 15 days the parties shall show cause in writing why the Court should or should not grant petitioner leave to delete his unexhausted claims or dismiss the action without prejudice if he does not so elect. The parties may have ten (10) days to reply to the other's response. cc: attys.
24/82		MOTION to delete unexhausted claims fld. by petitioner. REF._____.
31/82		ORDER (DDN) fld., It is hereby ordered that a hearing on petitioner's ground 2 be and is set for Wednesday, April 21, 1982, at 9:00 a.m. in Cape Girardeau, Mo. cc: attys.
13/82		ORDER for payment of Witness' fees by U. S. Marshal Service (DDN) fld., cc: attys.
21/82		MEMO (DDN) fld., Evidentiary hearing held in Cape Girardeau, MO. Petitioner has 20 days after Court Reporter prepares transcript to file post-hearing memorandum. Respondent has 20 days thereafter to file a responsive memorandum. cc: attys.
~~4/82~~		~~MINUTE ENTRY - Parties present - cause continued to Monday, May 10, 1982 at 9:30 a.m.~~
1/82		TRANSCRIPT of Hearing of 4/21/82 fld.

Best Copy Available

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

OCT 7 1982

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

VICTOR PAUL ANDERSON,

Petitioner,

vs. No. 81 - 1187 C (2)

GERARD FREY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER,

Respondent.

ORDER

IT IS HEREBY ORDERED that a certificate of probable cause to appeal be and is issued.

IT IS FURTHER ORDERED that petitioner's motion for leave to appeal in forma pauperis be and is denied as moot, as leave to so proceed was granted at the institution of this action. See Rule 24, Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT JUDGE

Dated: October 7, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 81-1187 C
	)	
GERALD FREY, Superintendent, Missouri Eastern Correctional Center,	)	Court No. 2
	)	
	)	
Respondent.	)	

Cape Girardeau, Missouri
April 21, 1982.

TRANSCRIPT OF HEARING

EILEEN R. GROH
OFFICIAL COURT REPORTER
UNITED STATES COURT HOUSE
1114 MARKET STREET
ST. LOUIS, MO. 63101

APPENDIX B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 81-1107 C
	)	
GERALD FREY, Superintendent, Missouri Eastern Correctional Center,	)	Court No. 2
	)	
	)	
Respondent.	)	

Cape Girardeau, Missouri
April 21, 1982.

TRANSCRIPT OF HEARING

Transcript of testimony adduced and proceedings had during the hearing in the above-styled cause before the

HONORABLE DAVID D. NOCE,

Magistrate Judge of the Magistrate Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Cape Girardeau, Missouri.

A P P E A R A N C E S:

MR. JASON MOORE RUGO, attorney for the petitioner.

MR. JAY HADEN, Assistant Attorney General, attorney for the respondent.

• • • •

Q What is your job?

A Sheriff of New Madrid County.

Q How long have you held that position?

A Since 1976.

Q Okay. Sheriff Ivy, how large a department is that Sheriff's Department?

A I have a four-man deputy, Road Deputy Department.

Q Do I understand that you have some connection also with city marshals throughout your County?

A That is correct.

Q What's the nature of that connection?

A Some of the city marshals are also part-time deputies.

Q All right. Sheriff, could you explain, please, some of the duties that you have as Sheriff other than the normal law enforcement duties that we are all familiar with?

A Well, of course, subpoenaing jurors, subpoenaing witnesses, delivering civil summons.

Q Do you have occasion also to serve as a bailiff at criminal trials?

A That is correct.

Q On what frequency does that occur?

A On our circuit court, circuit court days. Any time

that the circuit court is in session, we have a jury trial, I normally serve as bailiff.

Q Okay. There is no regular bailiff. You would be the bailiff of choice?

A That's correct.

Q I take it then that part of your duties are to procure jurors for special panels for criminal trials?

A That has been a --

Q Okay. Sheriff, could you describe, please, for the Court the procedure involved in selecting these special panels?

A I would receive a venire, special venire from the circuit judge, directed by the circuit court to panel X amount of jurors.

Q Is this just delivered to you?

A Yes, sir.

Q Okay. What's the first step you take when you receive this special venire?

A Of course, the first step I take is to determine when the jurors are to be impaneled, and if I have the time I can make the contacts with the various deputies and the various parties of the county personally. Otherwise, it's like maybe for the next day, I will simply radio these particular deputies or city marshals, and tell them that we

have to have extra jurors.

Q All right. Sheriff, why don't we just back up a little bit.

Are you involved in the selection at all of normal jury panels?

A In the normal jury panels?

Q Right.

A No, sir.

Q Do you know how those panels are selected?

A Yes, sir, I do.

Q Could you just describe briefly how that occurs?

A The normal jury panel is selected from the voters registration book.

Q Okay. Now, under what circumstances would you be asked to procure additional jurors, a special panel?

A In the event that the regular jury panel had been expired, or a portion of it, we lacked a portion having enough jurors to perform a jury trial.

Q All right. Now, are -- on occasion are you asked prior to a trial to procure these special panels?

A I don't follow your question.

Q What I am getting is how would you or how would someone in the circuit clerk's office know that additional jurors, a special panel, might be needed?

A I suppose simply because some of them have been disqualified for maybe sickness, for vacation, or absent for cause.

Q Okay. Sheriff, are you given any instructions on how to procure additional jurors, a special panel, or is that completely up to your discretion?

A That's left to my discretion.

Q Okay. Do you have any sort of a written policy that you use, or do you have any sort of policy that communicates to your deputies and marshals?

A Yes, sir.

Q What is that policy?

A I try to pick the extra jurors, the venire panel, through the entire geographical area of the county, and let's say, for instance I have eight jurors, I will try to pick two from one particular area and two from another and two from another and two from another, maybe even expressing to a particular person that I want him to pick up two lady jurors or two male jurors, and maybe the other one I might have to pick up two black jurors, and maybe the other one two particular white jurors.

Q All right. Now, how would you know how to break the group down into these component parts, women and blacks?

A I really don't have any reason to know why, other

than I felt like that it is my discretion that they should be mixed.

Q Okay. Now, of course, these jurors have to be residents of your county, isn't that so?

A Definitely.

Q Okay. How would you go about determining that potential jurors are residents of your county? Is that something you just know?

A Knowledge.

Q Now, do I understand that you did not select -- I suppose for the record we should state that we are talking about October of 1980. I understand your procedures have changed and are different now than they were back then.

A I'm not sure about the date, but it has changed.

Q All right. Do I understand that, for example, in October of 1980 you would not have been involved in selecting additional jurors personally, but that's something that you would delegate to your deputies and marshals?

A That's correct.

Q Okay. This policy that you just explained, how would you communicate this to your deputies and marshals?

A Normally by radio. If I could not raise them by radio, by telephone.

Q Okay. And, typically, what kind of instructions

would you give them?

A Just that we have -- we have a special venire for a particular day, and for them to pick up particular jurors and have them impaneled by 8:30 at a certain time.

Q Okay. Now, would you know for what trial these jurors are being procured for?

A Yes, sir.

Q Would you tell the deputies, marshals, what trial these jurors are being procured for?

A Not necessarily what, just the particular style of the case, but the particular day and the -- well, in our particular case we know probably what trial we're trying. We have a small county.

Q Normally the deputies and marshals would know who the defendant was going to be?

A Normally, yes.

Q Okay. Sheriff, how large are some of the townships in the area, I guess you call them, Gideon and Risco, are these towns in your county?

A Yes, sir. Gideon, for instance, is about, oh, 1,500.

Q Okay. How about Risco?

A Risco is approximately 500.

MR. RUGO: Your Honor, may I approach the witness,

please?

THE COURT: Surely.

(Documents were marked for identification as Petitioner's Exhibits 1 and 2.)

Q (By Mr. Rugo) All right. Sheriff, let me hand you what have been marked as Exhibits 1 and 2. And let me ask you if you recognize those and if you can, if you will identify them for us, please.

A Yes. These are venires that were issued to me on these dates to procure extra jurors for this case.

Q Okay. Now, on what date do those exhibits indicate the trial is to begin?

A Okay. On the first one it is to be on the 29th day of October, 1990 at 9:00 a.m..

Q All right. Do those -- do those special venires indicate the style of the case, the number of the case?

A Just the number.

Q Okay. Now, how -- who -- that would be prepared in the circuit clerk's office?

A That's correct.

Q And that would be then delivered over to you?

A That's correct.

Q All right. When you receive that -- all right. Now, there's no indication on those exhibits who

the defendant is, yet you say that is something that you would normally know.

A Yes, sir.

Q Okay. Now, the two special venires were issued on two separate days. Isn't that correct?

A Yes, sir.

Q In fact, one of them was issued on October the 27th, is that so?

A That's correct.

Q And the other one was issued on October the 28th?

A That's correct.

Q For a trial set to begin on October 29?

A That's correct.

Q Okay. When you received, let's take the first one on October 27, do you have any recollection at this time as to what you did to procure these additional jurors?

A Just through the normal procedures that I explained earlier.

Q Okay. Now, would you have radioed the deputies and marshals or how would you have contacted them on this occasion?

A Very surely that I did, yes, that they were radioed.

Q Okay. Sheriff, do I understand you brought some records with you today?

A Yes, I did.

Q Would those records indicate how many deputies and marshals around the county you contacted?

A Yes, sir.

Q Okay.

MR. RUGO: Judge, if I might just look at these briefly.

THE COURT: All right.

Q (By Mr. Rugo) All right. Sheriff, which of these documents would indicate the deputies and marshals that you contacted?

A This document right here. It is a handwritten document of my own.

Q Okay. And that was a document that you prepared at the time that you procured these jurors?

A Not necessarily at the time that they were, but for my own personal records to show who I had asked to pick up certain jurors.

Q All right. Sheriff, how many -- how many sheriffs, deputy sheriffs and marshals did that document indicate that you contacted?

A A total of six.

Q All right. Now, when you would contact these, these deputies and marshals, I take it you would just tell them

that you needed five, six jurors by the 29th, please have them in. Is that how it would go?

A That's technically. That's -- I would tell each one of them to have a certain amount of deputy -- or jurors.

Q Okay. Now, does your document indicate which marshals and deputies you contacted on the 27th and which you contacted on the 28th?

A I don't believe it does.

Q Okay. Would you have any independent recollection of that?

A No, sir.

Q Would these deputies and marshals contact you before trial date or would they simply come in with the jurors, or would the jurors appear by themselves?

A No. They would call me back and let me know what the jurors' names was and that they had been notified to appear.

Q Would they call you back the same day that you would notify them?

A Normally, yes.

Q Okay. Would they indicate to you how they had gone about selecting these jurors?

A No, not necessarily.

Q Do you know how they would have gone about selecting

the jurors?

A I think I know. I think I probably could answer that if you might ask me to.

Q Could you go ahead and explain these, please?

A I feel like they walked out on the street and saw people that they felt like they were citizens of the county and knew them to be citizens of the county and that they were, would be qualified jurors, and asked them to serve.

Q Now, when you say "knew them to be qualified jurors," would you explain that?

A Upstanding citizens.

Q Okay. Now, by "upstanding citizens," I take it then it would be someone that they recognize as living in their area, in their town.

A Certainly.

Q Someone that they would know around town, the name and the face?

A Certainly.

Q So, really what you are describing then is not a situation where they would just go to the first person they came to, but they would look around, correct me if I'm wrong, look around and look for someone that they knew to be an upstanding person?

A Well, I don't think they would -- I don't think they

would go picking for an upstanding person, but I think that they would just go out on the street and find people that they knew that would be people that could attend a jury trial without being prejudiced in any way.

Q Would factors of convenience enter into their selection? Would they choose people they knew wouldn't be inconvenienced by jury duty?

A Very possibly.

Q Would they go to a local banks or businesses to procure these jurors?

A I'm sure they have in the past. I don't know if they did in these particular cases, but I'm sure they have in the past.

Q All right. Sheriff, I understand in your documents now you have a list, what's called a jury list, in the case of State of Missouri versus Victor Paul Anderson. Is that correct?

A Yes, sir.

Q Sheriff, I was wondering if you could look at that jury list, and I'd like to ask you about certain of the individuals on this list, and ask you if you are acquainted with them or know them. First of all, are you acquainted with, or do you know Donna Nettles?

A Yes, sir.

Q Okay. Could you describe how you know Donna Nettles?

A I know her as a lady that used to play on a ladies softball team at Gideon. My wife also played on a softball team for the City of New Madrid. That's the acquaintance.

Q Would you occasionally attend these games?

A Yes, sir.

Q Did you have occasion to speak with Donna Nettles in any of these games?

A Yes, sir.

Q On a friendly basis?

A Yes, sir.

Q Do you know who Cleo Patillo is?

A Yes, sir. He's a gentleman lives in Gideon. I just know him by meeting, acquaintance on the street.

Q Someone you'd seen around town?

A Yes, sir.

Q Ever have occasion to talk to him?

A If I -- I might walk in the coffee shop. He might be in drinking coffee and I speak to him and pass the time of day.

Q Just for the record, Sheriff, where does Donna Nettles live?

A In Gideon.

Q In Gideon, also. Who would the deputy sheriff have

been who was in charge of procuring additional jurors from Gideon?

A James Pickard.

Q Okay. Now, I'm sorry, where did you say that your Sheriff's offices were?

A New Madrid.

Q How far is that from Gideon.

Q Approximately 30 mile.

Q Okay. Now, does Deputy Pickard work out of your office?

A Yes, sir. He has -- he lives in Gideon. He works out of my office.

Q Okay. Does he have a separate office in Gideon or --

A No, not necessarily.

Q Okay. So, I'm just a bit confused. Clarify for me, if you asked him to procure jurors, would you tell him to go to Gideon to procure these jurors?

A No. He lives there; that's where he works from. That's his general working quarters.

Q He works there as opposed to working out of your office in New Madrid?

A That's correct.

Q Sheriff, do you know who Virgil Penrod is?

A Yes, sir.

Q Okay. How do you know Virgil Penrod?

A He's a gentleman lives in Risco, Missouri. I've known him for several years, not on a personal basis. We drink coffee occasionally, that's about all.

Q How many years have you known Virgil Penrod?

A 25 years.

Q Okay. Now, if you could, look at your jury list, Sheriff, some of the other names on here, for example, Raymond Mayes. Do you know Raymond Mayes?

A Yes, sir.

Q How do you know Raymond Mayes?

A Raymond Mayes is also a gentleman that lives at Risco, Missouri. His nephew runs a gas station or did run a gas station there in Risco that I was acquainted with and still am acquainted with. We are just friends.

Q Okay. Friends. Do you meet occasionally then on a social basis?

A Just occasionally. We may meet in a coffee shop and have a cup of coffee or --

Q Okay. You consider him an upstanding citizen?

A Yes, sir.

Q Okay. How about George Young, do you know George Young?

A Yes, sir.

Q How do you know George Young?

A George is a black male from, I believe from Portageville.

Q Is that all you know about him?

A Yes, sir. That's about all, yes.

Q Have you ever had occasion to talk with George Young?

A No, sir.

Q Do you know how he's employed?

A No, sir.

Q How about Ed Moody?

A Ed Moody's a white gentleman from Portageville. He's an automobile mechanic.

Q All right. So, as you are describing these people, these are people who you would recognize, if you saw them on the street?

A Yes, sir.

Q All right. How about Venita Schuhardt? Is that --

A Venita Schuhardt is a lady who lives near Morehouse, Missouri on a farm, and that's about all I know about her. I doubt very seriously that I would recognize her if she walked in here today. However, if she came in with some of her associates in the Morehouse area, I probably would recognize

her.

Q Okay. How about M. B. Young?

A He's a black male from Howardville. I know him when I see him.

Q Sam Reilly?

A Sam Reilly is a black male from Lilbourn. I've spoken to him a dozen times in the past 10 years.

Q And how about Abbie Coffey?

A Abbie Coffey is a black male, or black female, I'm sorry, and I believe she lives in Portageville.

Q Just a couple more names, Sheriff. Howard Tillman.

A Yes, sir. Howard Tillman is a white man who lives in Conran, Missouri. We've talked probably twice, three times a year.

Q Would you happen to be in his town, or he happened to be in your town, how, casual social conversation?

A I may see him crossing a street in New Madrid or I may see him crossing a street in Portageville. I may meet him on the highway.

Q Would you call out to him or he call out to you, "Howdy"?

A Sure, just friendly gesture.

Q How about Owen Reilly?

A Owen Reilly lives in Lilbourn. I know him just as Owen Reilly. I've talked to him on two or three different occasions.

Q Okay. Sheriff, you wouldn't know, would you, whether M. B. Young, Sam Reilly and Abbie Coffey had served on juries several months prior to the Victor Anderson trial, would you?

A Normally no. Normally they would not have. The Jury Commissioners try to choose the panel to where they have not served in the past 12 months.

Q Okay. Now, these three, I understand, are jurors who were procured pursuant to the special venires that you have. Would you tell your deputies and marshals to avoid picking people who had prior jury duty within the past year?

A Not necessarily, because I probably wouldn't have the knowledge to remember who had served and who had not served in the past year, 12 months.

Q Okay. Sheriff, you were bailiff at the trial of Victor Anderson, weren't you?

A Yes, sir.

Q What were some of the duties that you would perform as bailiff at this trial?

A Opening and closing court, waiting on the court,

handling of the jurors, if they were to be taken to lunch or something of this nature.

Q Okay. So you would bring them in and out of the courtroom?

A I would partially be responsible for it.

Q Okay. Now, when some of these people would come in and serve as jurors, apparently you knew most, if not all of these people, would they nod to you as they came in, or would they in any way indicate they knew you?

A Certainly.

Q Would they say anything to you as they came in?

A Tried to avoid not to talk to them if I could, other than good morning or some --

Q Okay. Sheriff, who investigated the Victor Anderson, the Victor Anderson crime, that was tried in October of 1980?

A I believe this was Deputy Patterson, the best I can recall.

Q Were you in any way involved in the investigation of that crime yourself?

A I don't recall if I was directly involved. I may have been present at the time that they brought the subject to the jail, and as far as the investigation, I don't believe I was directly involved in the investigation.

Q At that time were you aware of the history of Victor Anderson?

A Not wholeheartedly, no, sir.

Q Okay. Do you know that he was due to go to trial the next day for an earlier crime?

A It seems like I did recall something of the nature, I'm not really sure. It's been so long.

Q Okay. Sheriff, I assume that Deputy Patterson was under your direct supervision and control?

A That's correct.

Q Would he report to you?

A That's correct.

Q And you were his immediate supervisor?

A Yes, sir.

Q Okay. Sheriff, going back again to the way that these special, special jurors were selected, I take it if confronted with the choice between a total stranger and someone who was acquainted with the officers, that they would avoid the total stranger and go to the person who is acquainted, is that correct?

A Well, if it was a total stranger, I think they probably wouldn't have the knowledge that he lived in the county and would not be a registered, qualified voter for a juror.

Q Okay. And that was one of the primary factors in selecting the juries, to make sure they were county residents?

A Yes, sir.

Q Okay. Do you recall, sir, who the foreman of the Victor Anderson jury was?

A No, sir, I don't.

Q I take it when you have additional jurors procured, you're after reliable, dependable people. Is that correct?

A Well, we try to have people that we feel like that can withstand the day's work as being a juror.

Q Okay. You would want someone who'd appear, obviously, and who is reliable enough to appear?

A Yes, sir.

Q Would you know, Sheriff, whether your deputies or marshals would mention the name of the defendant to these jurors as they approached them and asked that they be ready for duty?

A Normally they wouldn't, because I'm sure that they've been instructed, as I have always been, had always been instructed in years prior, not to mention who the defendant or what the style of the case was.

Q Okay. Now, generally, Sheriff, how -- would you know how the citizens of your county would react, if one of your deputies and marshals came up and asked them to serve on

the jury? Was this something they were eager to do or something to be avoided like the plague?

A I don't think anybody really likes to be a juror, and I think on many occasions they have probably had to go to several different ones before they could get people that would agree to serve as jurors.

Q So, I understand it then, these deputies and marshals would avoid those who might be inconvenienced by the trial?

A Well, most certainly.

Q Okay. They'd be after solid, upstanding people?

A Certainly.

MR. RUGO: All right. I have no other questions at this time.

THE COURT: Cross-examine.

* * * *

CROSS-EXAMINATION

BY MR. HADEN:

Q Sheriff, you are an elected official, aren't you?

A Yes, sir.

Q How many times have you run for office?

A Twice. Twice for the office of Sheriff.

Q Yes. You've been elected both times?

A Yes, sir.

Q How many registered voters are there at New Madrid County?

A 14,000, approximately.

Q And what percentage of those would you say you could recognize or know?

A 65, 70 percent.

Q Okay. And within the town of New Madrid, that percentage would be much higher?

A Yes, sir.

Q If we could go to the jury list you got in front of you, I don't know if that's an exhibit yet or not, but I'll let you refer to that.

What's the first name on that list?

A Geneva Day.

Q Okay. I've got the same list here, and who is the first alternate that was summoned, pursuant to the special venires?

A Howard Tillman.

Q Howard Tillman. And is he number 27 on that list?

A That's correct.

Q And who selected Howard Tillman, who got him there?

A Deputy Ed Martin.

Q Okay. And is he -- does he hold another position, Deputy Martin?

A He is a part-time -- he's marshal and part-time deputy.

Q And he is marshal in Lilbourn, is that correct?

A Yes, sir, that's correct.

Q Okay. Moving on to number 28, who is that?

A That's Donna -- I'm sorry -- that's Owen Reilly.

Q And who was he summoned by?

A Deputy Marshal Ed Martin.

Q Okay. The same gentleman we've just referred to?

A Yes, sir.

Q I believe we've already discussed Donald Nettles and Cleo Patillo.

A Patillo.

Q I'm sorry. And Raymond Mayes and Virgil Penrod. Who selected number 33 there, and that name is --

A George Young.

Q Who selected him?

A That would have been Deputy Joe Moore. He is a deputy and marshal of Portageville.

Q Okay. And Mr. Ed Moody, I believe that name's on there.

A Number 34?

Q Yes, sir.

A That would have been by Deputy and Marshal Joe

Moore of Portageville.

Q Okay. How about the next name?

A Venita Schuhardt. That would have been by Deputy Sheriff Bud Ross of Morehouse.

Q And does the same thing go for the next person, Mr. Ward?

A That is correct.

Q And the next name, please, Sheriff?

A M. B. Young was selected by Deputy Robert Young.

Q Okay. And does he hold a position as a marshal also?

A No. He is a full-time deputy.

Q Where is he from?

A From Howardville.

Q Okay. Mister, the number -- by the way, is Mr. Young a black or white man?

A Black.

Q Okay. That's Robert, your deputy, we're talking about?

A Yes.

Q Okay. Mr. Reilly, is that the next name?

A Sam Reilly?

Q Yes.

A Would have been chosen by Deputy and Marshal Ed

Martin.

Q Okay. And Abbie Coffey, the last name?

A That would have been chosen by Deputy Joe Moore, Deputy and Marshal.

Q Okay. So I think you may have answered this one before, how many different people were involved in selecting these 13 people?

A Six.

Q Of these 13 people would you, are there any good friends on this list, on that, from number 27 to 39, people on that list that you would call good friends of yours?

A Well, I don't consider them close friends, if that's what you're driving at.

Q Yes. That is what I am. No close friends on that list?

A No, sir.

Q Acquaintances. Let's step down to there. Are -- are there any people from 27 to 39 that you would characterize as acquaintances, I mean, did --

A I know every one of them.

Q But there are some that you just know by sight and there are others that you know to speak to?

A That's correct.

Q Now, is that, that percentage, that you know all of

them, is that unusual, if you were to pick 13 people out of your county?

A No. I might pick 100 and know all of them.

Q Okay. As a matter of fact, since you run for office, would you hope to know?

A Yes, sir.

Q Okay. Did you testify against Victor Paul Anderson at trial?

A I don't recall. I don't believe I did, but I'm not positive.

Q Do you have any independent recollection of the trial itself or --

A Just the fact that Victor Paul Anderson was charged.

Q You remember seeing him on the stand, in other words?

A Yes.

Q Okay. How long have you lived in New Madrid, Sheriff?

A New Madrid County?

Q Yes.

A Since 1940.

Q That's a good percentage of your life.

A Yes, sir. I've been in law enforcement in New Madrid

County since 1960.

Q Of the gentlemen that you used to summon these jurors we've mentioned, Joe Moore, Ed Martin, James Pickard, L. A. Scott, Robert Young and Bud Ross, are there any of those gentlemen who do not work for you in any capacity at all?

A L. A. Scott.

Q And what is his position?

A He is City Marshal of Risco.

Q And he is not a deputy sheriff in addition to that?

A No.

Q What would you say is the prime consideration that your deputies use in selecting these additional jurors or talesmen, I think, is the legal term for that.

A The fact that they knew the people and knew that they were not employed that day and that they were eligible to --

Q Is it a matter of availability and residency, basically?

A That's correct.

MR. HADEN: I think that's all I have.

THE COURT: Redirect.

MR. RUGO: Just a couple of questions, Sheriff.

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REDIRECT EXAMINATION

BY MR. RUCO:

Q You mentioned that L. A. Scott is not a deputy of yours. When you would contact him to procure jurors, under what authority would you get him to do this? Would he be doing this as a favor to you, or did you have authority or jurisdiction to ask him to do this?

A Just as City Marshal. You don't want to -- I like to have jurors from the geographical, the entire geographical area of the county, and that was a part of the region.

Q Okay. Now, when these jurors appeared in court, do I understand that these would be jurors that you would be presenting to the Court, would have been procured pursuant to the order issued to you?

A Yes, sir.

Q The deputies and the people who doubled as deputies and city marshals, those people under your direct control and supervision, is that correct?

A Yes, sir.

Q Okay. Did you ever have occasion to veto a name that had been selected for jury duty? If somebody called you up and gave you a name, you said, "No; no. Don't have that person."?

A If, for instance, the person that was selected and

I were real close friends, or for some reason he may have a particular reason that the deputy or city marshal doesn't know about that I do know about may be reason for me to exclude him.

Q Okay. I take it you don't know whether this occurred with Victor Anderson?

A Not in this particular trial.

Q Okay. Now, I think in response to Mr. Haden's questions, that we were characterizing close friends and acquaintances. You indicated that you were acquainted with virtually everyone on the list. Are there people on the list who you would consider more than just an acquaintance but not a very close friend, understanding that most of us have few close friends?

A Are you talking about the, the venire?

Q Right. From 27 on.

A Well, I know some of them better than others, if that's what you're driving at. Yes.

Q Okay. Which people would those be?

A Oh, I know Howard Tillman a little better. I know, of course, Donna Nettles a little better. I know Raymond Hayes a little better. I know Ed Moody a little better. I know Virgil Penrod a little better. That's about all.

Q Okay.

MR. RUGO: And, Judge, for the record, if we could just have this marked as an exhibit.

(A document was marked for identification as Petitioner's Exhibit 3.)

MR. RUGO: And I have no further questions.

THE COURT: All right. Any recross?

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RECROSS EXAMINATION

BY MR. HADEN:

Q I didn't understand your answer to one question that was asked by Mr. Rugo. Did you veto anyone at Victor Anderson's trial, anyone that the deputies or marshals had called in?

A Not to my knowledge.

Q Okay. Let's go back to the jury list. That's now 3 or C --

MR. RUGO: 3.

MR. HADEN: 3.

Q (By Mr. Haden) (Continuing) -- the jury list again, Sheriff. Let's talk about some of the regular jurors, the ones that the Jury Commissioners brought in.

A Okay.

Q I think we'll just use the ones that actually served. Number six there, John Gaddy, do you know him?

A Yes, I do.

Q Pretty well?

A He is a black male that lives in New Madrid.

Q Okay. Irene Brown?

A Irene Brown is a white lady who lives out between Risco and Gideon on the farm.

Q You know her pretty well, or just who she is?

A I just know her and know her husband.

Q Mary Dial?

A Mary Dial is a young lady that lives in Portageville; her husband is a real estate broker.

Q John Calvin Nanny?

A John Calvin Nanny lives in Portageville. I don't really know him that well. I know of him better than I know him.

Q Larry Brown?

A About the same. I'm not really close acquainted.

Q Would you recognize him on sight?

A Yes, sir.

Q Lonnie Duncan, Sr.?

A Lonnie Duncan lives in Lilbourn. He has been a carpenter for many years; I think he may be near retirement now.

Q James Horton?

A James Norton is an elderly farmer that probably should be retired within the next year or two.

Q Louis Fortner?

A Louis Fortner is, I believe, a farmer that lives out west of Tallapoosa, Missouri, which is between Risco and Gideon.

Q And Jackie Parker?

A I'm not acquainted with Jackie Parker. I know him by name.

Q Okay. So, the nine people we just mentioned, there's just one gentleman you're not acquainted with, correct?

A Correct.

MR. HADEN: I believe that's all I have.

THE COURT: All right. Thank you very much, Sheriff. You may step down.

(Witness excused.)

THE COURT: You may call your next witness.

MR. RUGO: Call Deputy Sheriff James Pickard.

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Official Court Reporter
U.S. District Court
St. Louis, Missouri 63101

JAMES PICKARD,

being produced, sworn and examined as a witness in behalf of the petitioner, testified as follows:

DIRECT EXAMINATION

BY MR. RUGO:

Q Could you state your name, please?

A James Pickard.

Q Where do you reside?

A Highway 162 East in Gideon, Missouri.

Q Okay. And I understand you're a deputy sheriff in New Madrid County?

A Yes, sir.

Q How long have you held that position?

A Since November of 1977.

Q Okay. And I understand that you work out of Gideon?

A Yes, sir.

Q Do you have an office there?

A No, sir, not really office. I use the City Hall at Gideon some, you know.

Q Okay. All right. Deputy, what are some of your duties other than the law enforcement? I take it you're asked occasionally to procure additional jurors for trials. Is that correct?

A Yes, sir.

Official Court Reporter
U.S. District Court
St. Louis, Missouri 63101

Serve criminal summons and --

Q Okay. Could you explain -- how would you be contacted to procure jurors?

A Either by radio dispatch or public service, by telephone.

Q And the sheriff would contact you, Sheriff Ivy?

A Or the dispatcher on duty.

Q Okay. Specifically, what would be said to you?

A Just that we was having a jury trial a certain date and needed to pick up two male jurors or male or female jurors or something to that effect.

Q Okay. Would you generally secure these additional jurors on the same day?

A Normally when they call me it would be for the next morning, so usually it would be for the next day.

Q Short notice, huh?

A Yessir.

Q What would you do, how would you go about trying to find these jurors?

A Just trying to pick someone that wasn't real busy or I might locate at this time that it wouldn't inconvenience too much.

Q How many people in the town of Gideon?

A 1,200 and some odd.

Q Okay. Now, when you say you think of someone who wouldn't be too inconvenienced, how would you make that judgment? How would you make that decision?

A Somebody I know might not be working or unemployed, laid off, or something like that.

Q Uh-huh. Okay. I take it you'd also want to make sure they are residents of Gideon and of the county?

A Yes, sir.

Q You would avoid people you didn't recognize, strangers?

A Well, yes.

Q Okay. Would you walk around the streets of Gideon to find these people, or would you drive out to these people's homes? How would you do that?

A Telephone, telephone call.

Q You know someone, you'd look up the number or you knew the number?

A I'd look the number up in the book.

Q Okay. Do I understand also occasionally you might drive out specifically to someone's house and ask them if they were available?

A I don't recall if I've done that before or not. I believe I use the telephone most of the time.

Q Okay. How would you come up with the names of people

that you would call? Would you go randomly through the phone book or would it be personal, that you're acquainted with?

A Well, I may be acquainted with them, or at least know their name, and that they were residents of Gideon and New Madrid County.

Q And that they might not be inconvenienced by jury duty?

A They might not be doing anything.

Q What would you say to them when you called them?

A I just ask them if there would be any reason why they couldn't go to New Madrid the next day and serve on a jury panel.

Q Would you ever happen to mention the defendant's name to them?

A No, sir.

Q What was generally the reaction; were they enthused about it or pretty upset at being asked?

A Most people were pretty good, if you get it to them that way, "Would there be any reason," and if I know they wasn't employed or something, there wouldn't be any reason.

Q All right. Now, when you would be asked to procure additional jurors, would you yourself know for what trial they were being procured?

A Occasionally.

Q Do you have any recollection of whether you knew Victor Anderson's trial was scheduled for the 29th?

A I don't recall if I did or not.

Q All right. When the sheriff would call you up, or the dispatcher, would they mention anything about whose trial was coming up, or the nature of the crime?

A I don't believe so, just that they wanted me to pick up X number of jurors.

Q Okay. Now, as I understand it, you were involved in the selection of Donna Nettles and Cleo Patillo.

A Yes.

Q You know Donna Nettles and Cleo Patillo, I take it?

A Yes.

Q Could you tell me and the Court how you know Donna?

A Well, she's lived in Gideon for several years and worked for her husband some at the elevator over there at Gideon and her and my wife played on the same softball team one year, I believe.

Q Did you have occasion to watch the games?

A Yes, if I'm available, not real tied up.

Q How would you know that Donna Nettles might be available and not be inconvenienced by jury duty?

A Well, when she worked for her husband, you know, at that time of the year I assume, I don't recall, but I'd say it

must have been when the elevator was not messing around too much.

Q Okay. So I take it that being asked to procure jurors, it would occur to you that Donna Nettles was available, you give her a call?

A Yes, sir.

Q And you looked in the phone book and get the number and give a call and ask her?

A Yes, sir.

Q How about Cleo Patillo, how do you know Cleo Patillo?

A Basically the same, he probably just lived around Gideon, I guess, probably all of his life.

Q How would you have known that Cleo Patillo was available?

A He's around town every day, I see him every day, see him go fishing; see him with the boat on the back of his truck.

Q Do you have occasion to talk?

A Maybe have a cup of coffee at the restaurant, that would be about it.

Q Now, do I understand then that you would have contacted Cleo when he was in town; do you know when you might have contacted him?

A I believe I called him on the telephone.

Q Okay. Again that was someone who you thought would be available and so you --

A Yes, sir.

Q (Continuing) -- gave him a call. All right.

In addition to the factors you've mentioned that would go into selecting these people, availability, no inconvenience, do I take it you would also select people you thought were solid citizens, upstanding citizens?

A Yes, sir.

Q Okay. And you, of course, also knew that these people lived in the county?

A Yes, sir.

Q Okay. Did you play any part in the investigation of the Victor Anderson trial, or crime?

A I don't believe so. It's been quite a while, but I don't believe I did.

Q Okay. Deputy, do you happen to recall if you procured any people other than Donna Nettles and Cleo Patillo for this particular jury, Howard Tillman, Nolan Reilly, Raymond Mayes, or Virgil Penrod, George Young, Ed Moody, Venita Schuhardt, M. B. Young, Sam Reilly or Abbie Coffey?

A No, sir, I did not.

MR. HUGO: Okay. I have no further questions.

THE COURT: Cross-examine.

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CROSS-EXAMINATION

BY MR. HADEN:

Q Deputy, you mentioned 1,200 people live in Gideon.

A Yes, sir.

Q How many of those people, what percentage would you believe you say you know or could recognize on sight?

A Probably 1,100 of them. Most of them.

Q Would you have a hard time coming up with somebod, you didn't know, if you were told to pick some jurors?

A Yes, sir.

Q Did you serve in any capacity at Victor Anderson's trial?

A I don't believe so, sir.

MR. HADEN: That's all I have.

THE COURT: Redirect. All right. You may step down. Thank you very much. You may call your next witness.

(Witness excused.)

MR. RUGO: Call Marshal Scott.

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LOUIS ALFRED SCOTT,

being produced, sworn and examined as a witness in behalf of the Petitioner, testified as follows:

DIRECT EXAMINATION

BY MR. RUGO:

Q Would you state your name, please? Would you state your name, please?

A Louis Allie Scott, Louis Alfred Scott.

Q And where do you live?

A Risco, Missouri.

Q How far is that from New Madrid?

A That's about 17 miles.

Q Okay. And what is your job there?

A I'm City Marshal.

Q Okay. How large a department is that in Risco?

A I'm it.

Q You're it. Okay.

Do you work out of an office or a town hall?

A City Hall.

Q Okay. And how long have you held that position?

A 15 year.

Q All right. Marshal, you're in no way connected with the Sheriff's office, do I understand that?

A No, sir.

Q Okay. However, I also understand that you would have

occasion to procure special jurors to serve in criminal trials, is that correct?

A When they are called in to me to pick somebody.

Q How frequently would that happen?

A Sir?

Q How frequently would this happen?

A Oh, not too often. I don't know. I would be afraid to say just exactly how often it would be, but not very often.

Q Okay. More often than once a month, less than once a month?

A Maybe once six months.

Q Okay.

A I go to them in person. You mean the party --

Q Who would ask you to procure these persons?

A Oh, who would ask me?

Q Yes.

A Well, it generally came from the Sheriff's Department, the dispatcher or maybe the sheriff would telephone me or radio.

Q Okay. Either by telephone or by radio?

A Yes, sir.

Q What was generally said to you?

A Sir?

Q What was generally said to you when you would be

contacted?

A Well, they needed a couple of men to serve on a jury or a couple of people, and asked me would I have anybody available or could I get anybody to serve.

Q I understand this is generally short notice; you have to have them either that day, same day, or the next day, is that correct?

A Correct.

Q How would you go about doing that?

A Just go to the party's house and ask them would they be free to serve on the jury, we needed a couple of jury men and would, and ask them to serve, I'd say, since that was their duty to do so. I would call their name in to the Sheriff's Department.

Q Okay. Now, you say you could go to the party's houses. How would you know whose houses to go to?

A Well, you just try to, myself, I know everybody in my town and I generally know who is pretty good citizens and so forth. I just go to the party's house or on the street where I could find them.

Q You had to look for someone you knew who lived in the town, first of all?

A Knew people that lived in town.

Q Someone that you knew yourself, that he lived in the

town?

A Know everybody in my town.

Q How many people in the town?

A About 450.

Q Okay. Do I understand also you know that they would be available for jury duty? Would you try to pick those kind of people?

A Not necessarily. You don't really know until you ask them.

Q Would you know that some people would be inconvenience by jury duty and then you wouldn't even ask them?

A Not necessarily. It would depend on what you needed and so forth, and what kind of people you had there, as I understand, or before you asked them to serve.

Q Would you just get in your car and drive to the first available house, or would you go to specific houses?

A Sometimes go to the house. Sometimes I'd met them on the street.

Q Okay. Would you ever mention to them the name of the defendant or the kind of trial they were going to be serving as a juror for, possibly?

A How, sir?

Q Would you ever mention the name of the defendant to them, these potential jurors?

A I would have no knowledge of that myself.

Q Pardon?

A As a general rule I'd have no knowledge of that myself.

Q I understand that you selected Virgil Penrod and Raymond Mayes for the Victor Anderson jury.

A That's correct.

Q Do you know Virgil Penrod?

A Yes, sir.

Q Okay. How do you know him?

A I knew him there in my town for about 30 or 40 years.

Q What does Virgil do?

A He's retired now. He was working on a farm, farm laborer.

Q Okay. Would Sheriff Ivy have occasion to come visit in your town, in Risco?

A Sir?

Q Would Sheriff Ivy have an occasion to visit in your town, the town of Risco?

A He'd have occasion to come through the town, yes. As a matter of fact, I think the Sheriff's Department does the banking in my town.

Q Okay. Would you know if Sheriff Ivy is acquainted an

knows Virgil Penrod?

A. I'm sure he would, yes.

Q. Have you ever seen them talking together or having a cup of coffee together, or anything?

A. Maybe in the crowd at the coffee shop or something like that, occasionally meeting that way.

Q. Okay.

A. Not personally.

Q. How would you ever have known if Virgil Penrod was available for jury duty?

A. I didn't know until I asked him.

Q. Did you call him on the phone or walk directly to the house?

A. I had talked to him in person.

Q. Where would you find him?

A. Phillips 66 Station in Risco.

Q. You recall finding --

A. No. I just -- just was driving around. I found him.

Q. What I'm asking you, do you have a specific recollection today of finding Virgil Penrod back in 1980 at the gas station?

A. Yes, sir.

Q. What did you say to him when you found him there?

A I just asked him would he be available to serve on the jury duty, that they needed some jury men, and he said, "I got nothing better to do."

That is his duty.

Q Where was he at the station?

A Sir?

Q Where was he located at the station; was he inside or outside?

A Inside.

Q Were there other people there?

A I'm sure there was, generally always three or four sitting around there like they generally do.

Q Could you have asked all of those people if they could serve as jurors?

A No.

Q You asked Virgil. Did you ask anyone other than Virgil?

A No, the first one I came to. He was the first one I asked.

Q Do you recall how many jurors you were supposed to procure that day?

A No, I really --

Q Okay. How about Raymond Mayes; where did you find Raymond Mayes?

A I believe I went by his house. I'm not going to say for sure on this.

Q Do you know if you found Raymond Mayes before or after you got Virgil Penrod?

A After.

Q Okay. Why -- well, strike that.

So, what you are saying is that after you secured Virgil Penrod he said he could serve, then you went out and drove to Raymond Mayes' house?

A (Indicating.)

Q Okay. But you didn't ask other people at the Phillips 66 Station if they wanted to serve?

A A few of them didn't want to. They had other things to do.

Q That took care of everyone else there?

A Thomas, Mr. Thomas, for instance, he was there and he had something else he had to do. He couldn't serve. Of course, you run across that, asking people would they serve.

Q Okay. How is Raymond Mayes employed?

A Raymond Mayes is unemployed at the present. He was employed for the Phillips 66 Book Plant L.P. Gas Company.

Q Was he unemployed at the time?

A Sir?

Q Was he unemployed in October of 1980 when he served

on this jury?

A I wouldn't say for sure; I don't remember.

Q Okay. You found him at his house?

A At his house.

Q Do you recall what time of day this was?

A I believe it was around noon or shortly after dinner.

Q Okay. Where -- was this a house that was close by the Phillips 66 Station?

A No. It was close by me.

Q And how far would that be from Phillips 66?

A Oh, about a block.

Q Okay. There would be other houses in the area?

A Yes.

Q Okay. Do I understand there would be houses between the station and Raymond Mayes' house; there would be other homes also?

A Other people, yes. Yes, uh-huh.

Q Marshal, in procuring additional, in procuring special jurors for the Sheriff, would you be looking for solid citizens, people you considered upstanding citizens?

A Not particularly. I dare say they would be honest and, well, you might say upstanding citizens. Citizens generally are.

Q Okay. People you know who were responsible and could

handle the duty?

A I would say probably.

Q Okay. And you played no part in the investigation of the Victor Anderson trial?

A Didn't even know the case.

MR. RUGO: Okay. I have no further questions at this time.

THE COURT: Cross-examine.

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CROSS-EXAMINATION

BY MR. HADEN:

Q Marshal, when the Sheriff or his dispatcher called you up and told you to summon jurors, did you even know it was a criminal or civil case?

A Had no knowledge of the case whatever.

Q Were you involved in any capacity at Mr. Anderson's trial?

A No, sir.

Q Is there anyone in Risco that you don't know?

A I'd say it would be very doubtful.

MR. HADEN: Okay. Thank you. That's all I have.

THE COURT: Any redirect examination? All right. You may step down. Thank you.

(Witness excused.)

THE COURT: Mr. Rugo, do you have any further evidence to offer?

MR. RUGO: Not at this time, your Honor.

THE COURT: All right. Mr. Haden, do you have any evidence to offer?

MR. HADEN: I have none whatsoever.

THE COURT: All right. Mr. Haden, you expressed an interest in ordering a transcript of today's hearing, and I'll give both sides an opportunity to file a brief in the case. I'll give the petitioner 20 days after the transcript's produced and 20 days after the petitioner files his memos. Is that sufficient time, Mr. Haden?

MR. HADEN: That's more than adequate, your Honor.

THE COURT: Okay. You can file them earlier, if you complete them. Okay. Anything further? All right. We'll be in recess. Thank you very much. Thank you for attending.

(Recess.)

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(Petitioner's Exhibits 1, 2 and 3 were received in evidence.)

REPORTER'S CERTIFICATE

I, EILEEN R. GROH, C.M. Official Court Reporter for the United States District Court, Eastern District of Missouri, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that to the best of my ability the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen R. Groh
Official Court Reporter.

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